United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-2073

To Be Argued By
LAWRENCE STERN, ESQ.

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W/PS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -X

UNITED STATES OF AMERICA ex rel.
EDITH MAY CAMERON, STANLEY TAYLOR SIMS,
KENNETH DAVIS, ROBERT STEWART WILLIAMS,
MARVIN CAMERON, and JENNIE SIMS,

Petitioners-Appellants,

-against-

CHARLES FASTOFF, Director, NYC Department of Probation; WALTER DUMBAR, NY State Director of Probation; JOHN KLEIN, Chief Probation Officer, Queens County; THOMAS AGRESTA, Presiding Justice, Supreme Court, Criminal Term, Queens County; LEON J. VINCENT, Warden, Green Haven Correctional Facility, Stormville, NY; J. EDWIN LAVALLEE, Warden, Clinton Correctional Facility, Dannemora, NY; JAMES THOMAS, Warden, Rikers Island, NY; and HAROLD J. SMITH, Warden, Attica Correctional Facility, Attica, NY,

Respondents-Appellees

- -X

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DENYING APPELLANTS' PETITION FOR WRITS OF HABEAS CORPUS

APPELLANTS' BRIEF AND APPENDIX

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TABLE OF CONTENTS

	Page
Table of Authorities	i
Issues Presented	1
Statement Pursuant to Rule 28 (a) (3). . . .	2
A. Preliminary Statement	2
B. Statement of Facts	2
Argument	
POINT I: THE STATE OF NEW YORK, ACTING THROUGH ITS LAW ENFORCEMENT OFFICER-AGENT, DEPRIVED APPELLANTS IN A CRIMINAL PROCEEDING OF THE 4TH, 14TH, 5TH, AND 6TH AMENDMENT RIGHTS TO A FAIR HEARING AND DUE PROCESS OF LAW, FREEDOM FROM ARBITRARY AND UNREASONABLE POLICE SEARCH AND SEIZURE, EFFECTIVE ASSISTANCE OF COUNSEL, COMPULSORY PROCESS, CONFRONTATION OF WITNESSES, BY IMPROPERLY INVOKING, AND INDICATING IT WOULD INVOKE, THE 5TH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, AND BY DECLINING TO RESPOND TO QUESTIONS ABOUT THEFT OF SEIZED EVIDENCE FROM APPELLANTS' HOMES AND ABOUT THE TRUTHFULNESS OF A SEARCH WARRANT AFFIDAVIT, QUESTIONS RELEVANT TO THE ISSUES ON THE HEARING, TO THE INTEGRITY OF THE CRIMINAL JUSTICE PROCESS IN THE CASE, AND TO THE BIAS, MOTIVES AND VERACITY OF THE OFFICER IN THE PERFORMANCE OF HIS POLICE DUTIES, BOTH AS A WITNESS AT THE HEARING AND IN HIS CONDUCT OF THE SEIZURE AND THE APPLICATION FOR THE SEARCH WARRANT.	16
POINT II: THE FACTS PRESENTED BY THE OFFICER IN HIS AFFIDAVIT CONTAINED INSUFFICIENT PROBABLE CAUSE UPON WHICH A SEARCH WARRANT COULD ISSUE.	32
POINT III: THE ABOVE QUESTIONS HAVING BEEN PRESENTED TO THE COURTS OF NEW YORK STATE AND APPELLANTS' CONTENTIONS HAVING BEEN REJECTED, AND THERE BEING NO PRESENTLY AVAILABLE STATE PROCEDURE BY WHICH TO SEEK FURTHER RELIEF, APPELLANTS HAVE EXHAUSTED STATE REMEDIES.	39
Conclusion	43

TABLE OF AUTHORITIES

	Page
Alderman v. United States, 394 U.S. 165 (1968)	16
Alford v. United States, 282 U.S. 687 (1931)	25
Aquilar v. Texas, 378 U.S. 108	32
Beck v. Ohio, 379 U.S. 89	32
Belles v. United States, 94 S.Ct. 2179 (1974)	21
Bowles v. United States, 439 F2d 536 (D.C.Cir., 1970) cert. den. 401 U.S. 995	29
Brown v. Allen, 344 U.S. 443 (1953)	30
Campbell v. United States, 365 U.S. 85 (1968)	17
Chambers v. Mississippi, 410 U.S. 284 (1973)	24
Christoffel v. United States, 200 F2d 734 (D.C.Cir., 1953)	17
Costello v. United States, 298 F2d 99 (2d Cir., 1962)	20
Davis v. Alaska, 94 S.Ct. 1105 (1974)	17
Denny v. United States , 384 U.S. 855 (1965)	17
Draper v. United States, 358 U.S. 307	32
Edwards v. United States, 312 U.S. 473 (1941)	16
Frazier v. Roberts, 441 F2d 1224 (8th Cir., 1971)	42
Gardner v. Broderick, 392 U.S. 273 (1967)	19
Goldberg v. Kelley, 397 U.S. 254 (1969)	19
Green v. McElroy, 360 U.S. 474 (1959)	17
Henry v. Mississippi, 379 U.S. 443 (1965)	42
Lefkowitz v. Newsome, 95 S.Ct. 886 (1975)	6
Mongaser v. United States, 335 F2d 971 (9th Cir., 1964)	36
People v. Brown, 24 N.Y. 2d 421 (1969)	37
People v. Corrado, 22 N.Y. 2d 308 (1969)	35
People v. Lawrence, 31 A.D. 2d 71 (3rd Dept., 1968)	35

	Page
People v. Malinsky, 15 N.Y.2d 86 (1965)	37
People v. Merola, 30 A.D.2d 963 (2d Dept., 1968)	35
People v. Rainey, 14 N.Y.2d 35 (1968)	35
People v. Ramistella, 306 N.Y. 379 (1954)	17
People v. Scheider, 36 N.Y.2d 708 (1975) relying on dissent 44 A.D.2d 845	28
Perry v. United States, 336 F2d 748 (D.C.Cir., 1964)	36
Picard v. Connor, 404 U.S. 270 (1971)	40
Rochin v. California, 342 U.S. 165 (1952)	24
Rogers v. United States, 340 U.S. 367 (1951)	22
Sibron v. New York, 392 U.S. 40	32
Snyder v. Massachusetts, 291 U.S. 97 (1934)	19
Spinelli v. United States, 393 U.S. 410 (1968)	32
Leroy v. Ohio, 392 U.S. 1 (1968)	35
Townsend v. Sain, 372 U.S. 293 (1963)	31
United States ex rel. Carthan v. Sheniff, 330 F2d 100 (2d Cir., 1964) cert. den. 379 U.S. 929	22
United States ex rel. Leeson v. Damon, 496 F2d 718 (2d Cir., 1974)	42
United States ex rel. Vanderhorst v. LaVellee, 417 F2d 411 (2d Cir., 1969)	42
United States v. Andolschek, 142 F2d 503 (2d Cir., 1944)	17
United States v. Beekman, 155 F2d 580 (2d Cir., 1946)	17
United States v. Cardillo, 316 F2d 606 (2d Cir., 1963) cert. den. 375 U.S. 822	21
United States v. Carmichael, 489 F2d 983 (7th Cir., 1973)	25
United States v. Clark, 475 F2d 240 (2d Cir., 1973)	19
United States v. Coplon, 185 F2d 629 (2d Cir., 1950) cert. den. 342 U.S. 920	17

	Page
United States v. DiRe, 332 U.S. 581 (1948)	36
United States v. Fernandez, 506 F2d 1200 (2d Cir., 1974)	20
United States v. Gonzales, 488 F2d 833 (2d Cir., 1973)	25
United States v. Grayson, 166 F2d 863 (2d Cir., 1948)	17
United States v. Haggett, 438 F2d 396 (2d Cir., 1971) cert. den. 402 U.S. 946	25
United States v. Hayman, 342 U.S. 205 (1952)	19
United States v. Hinton, 219 F2d 324	35
United States v. Nixon, 94 S.Ct. 3090 (1974)	18
United States v. Robinson, 325 F2d 391 (2d Cir., 1963)	20
United States v. Seewald, 450 F2d 1159 (2d Cir., 1971) cert. den. 405 U.S. 978	22
United States v. Thomas, 489 F2d 664 (5th Cir., 1973)	25
United States v. Viale, 312 F2d 595 (2d Cir., 1963) cert. den. 373 U.S. 903	36
N.Y.C.P.L. §440.10 (2)(a)(c)	40

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel. :
EDITH MAY CAMERON, STANLEY TAYLOR SIMS,
KENNETH DAVIS, ROBERT STEWART WILLIAMS, :
MARVIN CAMERON, AND JENNIE SIMS,
:
Petitioners-Appellants
:
-against-
:
CHARLES FASTOFF, Director, NYC Department
of Probation, et al., :
:
Respondents-Appellees. :

- -X

ISSUES PRESENTED

1. Whether the State of New York, acting through its law enforcement officer-agent, deprived appellants in a criminal proceeding of the 4th, 14th, 5th, and 6th Amendment rights to a fair hearing and due process of law, freedom from arbitrary and unreasonable police search and seizure, effective assistance of counsel, compulsory process, and confrontation of witnesses, by improperly invoking, and indicating it would invoke the 5th Amendment privilege against self-incrimination, and by declining to respond to questions about theft of seized evidence from appellants' homes and about the truthfulness of a search warrant affidavit, questions relevant to issues on the hearing, to the integrity of the criminal justice process in the case, and to the bias, motives and veracity of the officer in the performance of his police duties both as a witness at the hearing and in his conduct of the seizure and the application for the search warrant.

2. Whether the facts presented by the officer in his affidavit contained insufficient probable cause upon which a search warrant could issue.

3. Whether the above questions having been presented to the courts of New York State and appellants' contentions having been rejected, and there being no presently available state procedure by which to seek further relief, appellants have exhausted state remedies.

STATEMENT PURSUANT TO RULE 28 (a)(3)

A. Preliminary Statement

This is a joint appeal from orders of the United States District Court for the Eastern District of New York [Bruchhausen, J.] entered on March 20 and March 31, 1975, denying without a hearing appellants' joint petition for writs of habeas corpus for release from New York State custody. On April 15, 1975, the District Court denied appellants' motion for a certificate of probable cause to appeal to this Court, but on May 9, 1975, this Court granted the certificate. Timely notice of appeal has been filed.

B. Statement of Facts

1. The Procedural History of the Case

A joint petition for habeas corpus relief was filed in the Eastern District on behalf of Edith May Cameron who is detained by the State of New York in the custody of the Supreme Court of the State of New York, Queens County, and the State Probation Department [C.P.L. §410.50] on a sentence of probation and a $1,000.00 fine, and on behalf of Stanley Taylor Sims who is detained by the State of New York at Green Haven Correctional Facility, Stormville, New York, and on behalf of Kenneth Davis who is detained by the State of New York at Clinton Correctional Facility, Dannemora, New York, and on behalf of Robert Stewart Williams who is detained by the State of New York at NYC Correctional Institution for

Men, Rikers Island, New York, and on behalf of Marvin Cameron who is detained by the State of New York at Attica Correctional Facility, Attica, New York and on behalf of Jennie Sims who is detained by the State of New York in the custody of the Supreme Court of the State of New York, Queens County, and the State Department of Probation [C.P.L. §§410.50] on a sentence of probation and a fine of $1,000.00.

The cause of appellants' detentions are judgments of the Supreme Court of the State of New York, Queens County, rendered on May 15, 1972, convicting appellants Robert Williams and Marvin Cameron on their pleas of guilty to criminal possession of a dangerous drug in the second degree and sentencing them to 15 years imprisonment, convicting appellants Stanley Sims and Kenneth Davis on their pleas of guilty to criminal possession of a dangerous drug in the third degree and sentencing them to 15 years and 12 years imprisonment, respectively, and convicting appellants Jennie Sims and Edith May Cameron on their pleas of guilty to criminal possession of a dangerous drug in the sixth degree and sentencing them to a fine of $1,000.00 and a period of probation not to exceed three years. The petition was made on behalf of each appellant individually and severally pursuant to Federal Rules of Civil Procedure 20 (a) and 81 (a)(2).

These writs were sought because of illegal detentions pursuant to the above judgments of conviction rendered in violation of appellants 14th, 5th, 4th, and 6th Amendment rights to a fair hearing and due process of law, freedom from arbitrary

and unreasonable police search and seizure, effective assistance of counsel, compulsory process, and confrontation of witnesses, because the State of New York, acting through its law enforcement officer-agent, improperly invoked, and indicated it would invoke, the 5th Amendment privilege against self-incrimination, and thereby declined to respond to questions about theft of seized evidence from appellants' homes and about the truthfulness of a search warrant affidavit, questions relevant to the issues on the hearing, to the integrity of the criminal justice process in the case, and to the bias, motives and veracity of the officer in the performance of his police duties both as a witness at the hearing and his conduct of the seizure and the application for the search warrant.

The detentions further violate appellants' 4th Amendment rights, because the facts presented by the officer in his affidavit contained insufficient probable cause upon which a search warrant could issue.

Appellants Edith Cameron, Stanley Sims, Kenneth Davis, Robert Williams and Marvin Cameron were indicted in the Supreme Court of the State of New York, Queens County, for the crimes of criminal possession of a dangerous drug in the first degree, promoting gambling in the first degree, and possession of gambling records in the first degree. Appellants Edith and Marvin Cameron were additonally charged with possession of weapons and dangerous instruments as a misdemeanor. Appellant Jennie Sims was indicted separately for the crimes of promoting gambling in

the first degree and possession of weapons and dangerous instruments as a misdemeanor.

Prior to the introduction of their guilty pleas (Williams and M. Cameron, 2d degree drug possession; S. Sims and Davis, 3rd degree drug possession; J. Sims and E. Cameron 6th degree drug possession), appellants moved to controvert the search warrant and have the evidence suppressed because of police perjury and fraudulent conduct and because of the absence of probable cause for the issuance of the warrant. The motions were denied in the trial court; appellants pleaded guilty, and, in its first order, the Appellate Division affirmed the trial court's finding of probable cause; but, given defense counsel's averment that Knapp Commission testimony resulted in a Federal Grand Jury investigation of the arresting officers, wherein these officers had pleaded the 5th Amendment, the court ordered a hearing on the allegation of police perjury and misconduct. (People v. Cameron, et al., 40 A.D. 2d 1035, 2d Dept., 1972; See Appendix). After a hearing conducted pursuant to the Appellate Division remand, the Supreme Court denied appellants' motion to controvert the warrant on grounds of perjured police testimony and misconduct, (See Supreme Court opinion in Appendix), and the Appellate Division affirmed, with opinion (People v. Cameron, 44 A.D. 2d 355, 2d Dept., 1974; See Appendix). The Court of Appeals of the State of New York declined to hear the case (Certificate Denying Leave is appended hereto). The Supreme Court of the United States denied application for

a writ of certiorari on December 9, 1974.

On February 10, 1975 appellants filed a joint petition for writs of habeas corpus in the Eastern District. The case was assigned to Judge Bruchhausen of that Court. Oral argument of the issues was held in the Judge's chambers, but, despite counsel's request, the Judge refused to have a stenographic record kept of the proceedings. Approximately one week after the oral argument, on March 20, 1975, the Judge handed down a decision which denied the petition on the ground specifically overruled by the Supreme Court in Lefkowitz v. Newsome, 95 S.Ct. 886 (1975) (See Appendix). During the in-chamber oral argument, counsel had informed the Judge that there was no longer any question of the right of habeas petitioners in New York State custody as a result of State guilty pleas to petition for federal habeas corpus relief. Although Lefkowitz v. Newsome was sub judice when the petition in this case was filed, the case was decided by the Supreme Court in petitioners' favor a few days prior to the oral argument of this petition, and counsel so informed the Judge. The Attorney General, of course, did not oppose the petition on these grounds, offered by the Judge in the face of the Supreme Court decision.

Having received the Judge's order deciding the petition on clearly erroneous grounds, counsel informed the Judge once again by telephone call to chambers and by letter dated March 21, 1975 (See Appendix). Shortly thereafter, in a second handwritten order dated March 31, 1975, the Judge denied the

petition again, this time resorting to a simple handwritten recitation of the opinion in the Appellate Division of the Supreme Court of the State of New York (See Appendix). The Judge then denied a certificate of probable cause. This Court subsequently granted the certificate.

2. The Aborted State Hearing on Appellants' Motion to Suppress

The following is a summary of the hearing testimony that forms, along with the search warrant and affidavit, (appended hereto) the factual basis for the issues to be argued:

Patrolman Lucido Bonino testified that he was an expert on policy (4-5).*

On May 18, 1971, he and a brother officer were investigating appellant Stanley Sims. He did not recall on how many occasions prior to May 18, he had seen Sims, nor the approximate dates. He did not produce any prior reports made on Sims. He was unable to produce his memo book for May 18, the only day's observations detailed in the search warrant affidavit (6-9, 46-48, 12). Only after reading the search warrant was the Patrolman's recollection refreshed and was he able to testify to the circumstances related therein. He arrived in the vicinity of the Sims's residence at about 11:00 A.M., but he could not

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* Numerical reference are to the minutes of the suppression hearing.

remember where his car was parked (9-12). Sims left his residence, entered a car, and drove to the appellants' Cameron residence.

The court interrupted during this line of examination, and, although there had been no prior suppression hearing, the court ruled, "You are not going to go through the whole hearing _____... We are not going to go through the whole observation until you have something to indicate that perjury was made here" (13-18). Counsel objected to the interruption and argued,

> there is testimony to be adduced at this trial to indicate that the statements of the officer, of his observations were indeed not truthful and indeed never occurred, and, therefore, a perjured affidavit was submitted application [sic] for a search warrant. This is in conjunction with other questions of the credibility of the officer (16).

At this point defense counsel was directed to lay a foundation connecting testimony as to these events with his allegations that a Knapp Commission witness had said the officer had committed perjury with regard to this case. The Patrolman admitted being subpoenaed before a State, Queens County, Grand Jury in regard to this case, but he then took the Fifth Amendment when asked if he had been similarly subpoenaed by a Federal Grand Jury. After recess the hearing was adjourned to permit the officer to appear with counsel, pursuant to application of the District Attorney (15-22).

The officer subsequently appeared with counsel (27), and he was cautioned to confer only with his counsel, not to

look for comment from the two new Assistant District Attorneys who were brought into the case after the recess. Defense counsel, arguing, "who are my adversaries in this case?" statedto the judge that he had seen the witness looking to the prosecutor for comment before answering questions (30).

Honoring the new District Attorney's belated objection to the last question put before the recess, the Court struck the Patrolman's 5th Amendment answer and counsel asked again if he had testified before a Federal Grand Jury.

He said he was subpoenaed by a Federal Grand Jury but "I don't believe there were any questions asked regarding the Sims case. If there were, I did invoke my constitutional privileges" (31).

Over objection by the District Attorney that these questions were immaterial, the officer testified that when Sims was arrested a large amount of drugs and currency was seized at his residence (32-33). Although the court continued to permit the questions over DA objection, the Patrolman then invoked the Fifth Amendment and refused to answer questions as to whether any seized drugs, currency or jewelry was not turned over to the Police Property Clerk (34-37). He refused to answer similar questions with regard to unreported seizures of drugs, currency, or jewelry from the Cameron residence (38, 40-41).* Furthermore, he refused to answer whether he had

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* See next page

seized and kept any drugs not noted on the inventory made on the return of the warrant (39-40).

When asked if he had been questioned on the same subjects in the Federal Grand Jury and, if he had been questioned there about the truthfulness of the affidavit he submitted for a search warrant, he replied, "As far as my recollection goes, I was not questioned on that. And if I was, I would have invoked my constitutional privileges" (41).

He said he had made notes of the observations on May 18, 1971** that he later put in the affidavit but he did not believe he put these in his memo book and he probably threw them away (44-45). His memo book for May 19, 1971 said only "1115 hours to approximately 1545 hours, vicinity of Linden and 197th and Farmers and New York regarding search warrant observations;" none of his specific observations were in the memo book and he did not know if Police Department regulations required that such observations be written down (49-50).

Although he could not remember numerous details, the officer was able, after looking at his affidavit, to testify that on May 18, 19, and 20 he saw appellant Sims receive what

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* He denied that the real reason he got a search warrant for the Sims and Cameron homes was to steal money he believed was present there (43).

** His affidavit for the warrant recited observations on May 18, 19, and 20, 1971. Only for May 18 (the date for which no memo was available) were Sims' action detailed in the affidavit; for the 19th and 20th it was merely said that May 18 actions were repeated "to the letter."

he believed were policy bets at the front door of his and the Camerons' house (55-67).

Toward the end of counsel's examination of the witness the Court interrupted the examination:

> What do you want him to do, contradict the statements he made in the affidavit and everytime you ask him a question he looks at the affidavit to answer you? (69)

Henry Schnitzer testified that he was an expert on "policy" (72). He testified that in playing policy no one takes policy bets after the time that the third race is finished because after that race is finished the first number of the day's policy number can be ascertained (74-76). Therefore, no policy banker would take a bet after 2:00 P.M. (76) (and officer Bonino said he saw Sims allegedly taking policy slips after 3:00 P.M. [65]).

Edith Cameron testified that contrary to officer Bonino's testimony no one other than Stanley Sims entered her home between 11:30 A.M. and 2:30 P.M. on May 18, 1971; Sims stayed through the evening when the rest of the appellants also arrived (79-80).

Juanita (Jennie) Sims also testified that, contrary to officer Bonino's testimony, no one came to her home on May 18, 1971 between 2:55 and 3:30 P.M. (82).

Both sides then rested, the District Attorney having declined to present any evidence (84).

On the basis of the above testimony, and the lack of it under the Fifth Amendment, the trial court ruled that

appellants had not sustained their burden of proving perjury. The Appellate Division affirmed this ruling. While recognizing that,

> The remand was predicated on the allegations of the defense that the affidavit contained perjurous statements and that the officer had refused to testify before a Federal Grand Jury inquiring into his official conduct on the ground that his testimony might incriminate him, (emphasis supplied),

the Appellate Division seemed to rest its decision on the ground that the police theft of seized contraband in this case was irrelevant to the judicial inquiry. Despite the officer's own testimony that he would take the Fifth Amendment if asked whether his affidavit was truthful, the Appellate Division stated, "all of the police officer's refusals to answer dealt with occurrences which took place after the seizure under the warrant." (See Appendix for full text of the opinion).

As to the question of probable cause for the issuance of the warrant based on the face of the officer's affidavit, (See copy attached hereto), the Appellate Division simply affirmed the trial court's finding of probable cause.

Following the trial court's denial of their joint motion to suppress, appellants pleaded quilty, as above described, with the understanding, according to New York Criminal Procedure Law §710.70 that their constitutional rights with respect to the search and seizure and the conduct of the suppression hearing would be preserved: "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding

the fact that such judgment is entered upon a plea of guilty." See United States ex rel. Newsome v. Malcome, 492 F. 2d 1166 (2d Cir., 1974) cert. gtd. 94 S.Ct. 3170 argued Dec. 11, 1974, aff'd Lefkowitz v. Newsome, 95 S.Ct. 886 (1975).

3. State Remedy Exhaustion

As has been noted above, the issues surrounding the search and seizure itself and the conduct of the hearing to determine the facts surrounding the search and seizure were presented twice to the Appellate Division of the State of New York, Second Department, and the denial of the motion to suppress was there ultimately twice affirmed. People v. Cameron, et al., 40 A.D. 2d 1035 (2d Dept., 1972); People v. Cameron, 44 A.D. 2d 355 (2d Dept., 1974). The Court of Appeals of the State of New York, and the Supreme Court of the United States both declined to review the case. The opinions of the Courts of New York State and appellants' brief in those Courts, show clearly that the issues were substantially and fully presented and decided by those Courts.

> As counsel states, it is indeed a bizarre spectacle for a police officer appearing in Court to be exercising his constitutional rights in response to questions concerning activities while engaged in the performance of his official duties. Such conduct, both with respect to the proceedings before the Knapp Commission and this Court, lend support to the specter of police corruption requiring full airing of the facts in an effort to determine whether or not there was perjury in the affidavit admitted in support of the warrants . . . [However] even assuming, arguendo, that proof had been adduced of criminal acts of the police officer during or subsequent to the making of the affidavit,

the conclusion that the affidavit was perjurous would be without foundation.

(Opinion of the Supreme Court of State of New York [Brennan, J.] dated August 14, 1973. (See Appendix, hereto))

Officer Bonino's taking the Fifth . . . requires that the People come forward with some evidence . . . the lower court rejected this contention on the erroneous ground that it 'implies an inherent admission of perjury with respect to any sworn statements at any time previously made by any person who exercises such constitutional privilege.' (Emphasis added) Appellants would contend that equating the exercising of privilege with an assumption of perjury has a great deal of factual validity in the circumstances of this case. Furthermore, the legal validity of the equation also has great merit. Policemen are quasi-public persons who, while they have an absolute right to the Fifth Amendment when defendants on a criminal case, have no such absolute right in other situations. Since they may be disciplined or even fired for taking the Fifth Amendment (Gardner v. Broderick, infra) and since, when not defendants, their taking of the Fifth may be adversely commented upon . . . it is wholly proper to contend that when a policeman accused of perjury takes the Fifth Amendment this raises some implication of that perjury.

(Appellants' brief in the Appellate Division at pp 13 & 14)

The Court of Appeals has emphasized the importance of a police officer's notes as a defense tool and their absence here is particularly significant since they are the only objective evidence of what really happened on May 18th. When witness has taken the Fifth Amendment and the burden is on the caller to establish perjury, 'a right sense of justice' [particularly] entitled the defense to ascertain what the witness said about the subject under discussion on an earlier occasion. The failure of the prosecutor to produce these papers must weigh heavily against the People . . taking the Fifth Amendment 'deprived the defense of the opportunity of showing that there was prejury in the affidavit' and since the deprivation came about via the acitons of a

law-enforcement officer it must redound to the prejudice of the People. In other words, to the extent that officer Bonino's actions are considered as preventing appellants from supporting their burden of proof, the fault for that must be with the People . . . It must be noted that if the People, who asked Bonino not a single question, wanted to get at the truth they could have demanded Bonino sign a waiver of immunity at pain of losing his position. New York City Charter Section 1123 and New York State Constitution Article I, Section 6. See Gardner v. Broderick, 393 U.S. 273, 275-276 (1968). Instead, they opposed revealing the truth by repeatedly objecting to defense counsel's questions of Bonino, even after Bonino secured an attorney, and by introducing no evidence of their own.

(Appellants' brief in the Appellate Division at pp 15-16).

No one can hold a brief for a police officer who, in judicial inquiry, refuses to answer questions about the performance of his duties on the ground that his answers might be incriminating. However, as Mr. Justice Brennan pointed out, all of the police officer's refusals to answer dealt with occurrences which took place after the seizure under the warrant; none of them dealt with the truthfulness of the affidavit upon which the warrant was obtained. The record is crystal clear that he was examined in great detail about the contents of his affidavit and answered every question asked him with respect to that.

(Opinion of the Appellate Division, Second Dept., People v. Cameron, 44 A.D. 2d 355 1974)

ARGUMENT

POINT I

THE STATE OF NEW YORK, ACTING THROUGH ITS LAW ENFORCEMENT OFFICER-AGENT, DEPRIVED APPELLANTS IN A CRIMINAL PROCEEDING OF THE 4th, 14th, 5th, AND 6th AMENDMENT RIGHTS TO A FAIR HEARING AND DUE PROCESS OF LAW, FREEDOM FROM ARBITRARY AND UNREASONABLE POLICE SEARCH AND SEIZURE, EFFECTIVE ASSISTANCE OF COUNSEL, COMPULSORY PROCESS, CONFRONTATION OF WITNESSES, BY IMPROPERLY INVOKING, AND INDICATING IT WOULD INVOKE, THE 5th AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, AND BY DECLINING TO RESPOND TO QUESTIONS ABOUT THEFT OF SEIZED EVIDENCE FROM APPELLANTS' HOMES AND ABOUT THE TRUTHFULNESS OF A SEARCH WARRANT AFFIDAVIT, QUESTIONS RELEVANT TO ISSUES ON THE HEARING, TO THE INTEGRITY OF THE CRIMINAL JUSTICE PROCESS IN THE CASE, AND TO THE BIAS, MOTIVES AND VERACITY OF THE OFFICER IN THE PERFORMANCE OF HIS POLICE DUTIES BOTH AS A WITNESS AT THE HEARING AND IN HIS CONDUCT OF THE SEIZURE AND THE APPLICATION FOR THE SEARCH WARRANT.

In a criminal proceeding, especially when "the spectre of police corruption was raised here and justice required a hearing at which the facts could be fully aired" (Appellate Division opinion, 40 A.D.2d 1035, See Appendix), the State's refusal to respond to the judicial inquiry and provide evidence totally within its custody and control mandated reversal of the prosecution instituted by that same government. Edwards v. United States, 312 U.S. 473 (1941)(government refusal to provide defendant with copy of his SEC testimony when defendant requested it to show compelled incrimination, required reversal of conviction). As the Supreme Court stated in Alderman v. United States, 394 U.S. 165, 184 (1968):

"It may be that the prospect of disclosure

> will compel the Government to dismiss some prosecutions in deference to national security or third party interests. But this is a choice the Government concededly faces with respect to material which it has obtained illegally and which it admits, or which a judge would find, is arguably relevant to the evidence offered against the defendant."

A long line of precedent upholds the obligation of the State to respond to relevant subpoena in prosecutions it initiates and to give testimony and evidence which it controls, or else forfeit that prosecution. Dennis v. United States, 384 U.S. 855 (1965); Green v. McElroy, 360 U.S. 474, 496-497 (1959); United States v. Coplon, 185 F2d 629 (1950) (L. Hand, J.) cert. den. 342 U.S. 920; Campbell v. United States, 365 U.S. 85, 96 (1968); Christoffel v. United States, 200 F2d 734 (D.C. Cir., 1953); United States v. Beekman, 155 F2d 580 (2d Cir., 1946); United States v. Andolschek, 142 F2d 503 (2d Cir., 1944); People v. Ramistella, 306 N.Y. 379 (1954). As Judge Learned Hand put it,

> "a conviction should not stand when the accused has been denied access to documents relevant to his defense which are in the possession of a department of the Government, whose regulations make them unavailable at the trial." United States v. Grayson, 166 F2d 863, 870 (2d Cir., 1948)

Recently the Supreme Court reaffirmed the paramount necessity for disclosure of evidence in the control of the government in two cases where, unlike the instant case, the government had at least an arguably legitimate interest in the withholding of the evidence. In Davis v. Alaska, 94 S.Ct. 1105 (1974), the Court reversed a criminal conviction and held that,

> the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status as juvenile delinquent [even] when such an impeachment would conflict with a State's asserted interst in preserving the confidentiality of juvenile adjudications of delinquency. 94 S.Ct. 1105 at 1107

And, in United States v. Nixon, Nixon v. United States, 94 S.Ct. 3090 (1974), the Court held

> To read Article II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes, would upset the constitutional balance of 'a workable government' and gravely impair the role of the Courts under Article III. . . it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. 94 S.Ct. at 3107, 3108

Thus, if the legitimate governmental interests embodied in the privileges against disclosure of juvenile delinquency and confidential executive communications must give way to the demand for evidence in criminal proceedings, then in this case where the State can offer no legitimate interest of its own for withholding the evidence of its agent's corruption in the performance of his duties, the prosecution must fail.

In this case, a policeman, who, the Supreme Court has said,

> is directly, immediately and entirely responsible to the city or state which is his employer. He owes his entire loyalty to it. He has no other 'client' or principal. He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer ... the policeman is either responsi-

ble to the State or to no one. Gardner v. Broderick, 392 U.S. 273, 277-278 [1967]),

invoked a 5th Amendment privilege against giving evidence of his own corruption in the preformance of his official duties. This claim of privilege by this policeman, the representative of State action in the instant case, is a claim of 5th Amendment privilege by the State of New York, and, as such, may not be recognized by the Courts to permit the State to cover-up and withhold evidence of its own wrongdoing. If the violation of an individual's Constitutional rights during his investigation and prosecution for criminal acts can result in the exclusion of evidence and the voidance of the prosecution, and if the Courts are not to become party to cases made by the State on the basis of corrupt police practices, then the State cannot avail itself of a privilege which would effectively preclude judicial scrutiny of State corruption. This would apply especially in pre-trial suppression hearings where the very issue to be litigated is police violation of the law, where the search for truth is just as well served by full disclosure of the evidence as in a criminal trial and where, "disposition of the motion to suppress is as important as the trial itself since granting of the motion may require entry of a judgment of acquittal for lack of other proof sufficient to convict." United States v. Clark, 475 F2d 240, 247 (2d Cir., 1973); United States v. Haymon, 342 U.S. 205 (1952); Snyder v. Massachusetts, 291 U.S. 97, 106-107 (1934); cf., Goldberg v. Kelly, 397 U.S. 254 (1969).

In addition to being the representative of the State action in this case, the policeman was the actual informant, the person attesting to the facts of the search and seizure and its probable cause. And, as this Court has plainly held with respect to the informant's privilege in the context of the search and seizure hearing,

> This 'privilege' is not absolute, however, and occasionally the price of invoking it will be the dismissal of a case because of the inadmissability of evidence, the source of which is not subject to challenge due to the invocation of the 'privilege.' The 'privilege' must give way when a challenge of the informant is essential to the proper disposition of the case. The determination of the validity of an arrest, search and seizure is essential to such a disposition ... a reasonable opportunity for the appellant to challenge the reliability of the informant must be permitted on the motion to suppress, or no real judicial check would ever take place.
>
> Costello v. United States, 298 F2d 99, 101-102 (2d Cir. 1962)

See also United States v. Robinson, 325 F2d 391 (2d Cir. 1963); United States v. Fernandez, 506 F2d 1200 (2d Cir., 1974).

The same resultant preclusion of challenge to the source of the evidence occurs in this case as in all the cases cited, regardless of the nature of the privilege invoked, be it national security or third party interests (Alderman, supra), government regulations (United States v. Grayson, supra), confidentiality of juvenile adjudications (Davis v. Alaska, supra), executive privilege (United States v. Nixon, supra), the informant's privilege (Costello v. United States, supra), or, the Fifth Amendment privilege. Insistence on the privilege requires dismissal of the case or, at least, exclusion of the challenged

evidence. United States v. Cardillo, 316 F2d 606 (2d Cir., 1963) cert. den. 375 U.S. 822. Indeed, unlike the other privileges discussed, when the Fifth Amendment privilege is invoked by the police agents and other governmental corporate representatives, the lack of any legitimate interest behind the government corporate entity's invocation of that privilege, shifts the weight of decision totally in favor of the citizen challenging the governmental action. Indeed, the Supreme Court has held that large corporate entities, among which the states are the largest, have no 5th Amendment privilege, and that their agents and representatives may not invoke the privilege with respect to their corporate duties, regardless of consequent personal incrimination.

> 'Individuals, when acting as members of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations.' Since no artificial organization may utilize the personal privilege against compulsory self-incrimination, the Court [in United States v. White, 322 U.S. 694 (1944)] found that it follows that an individual acting in his official capacity on behalf of the organization may likewise not take advantage of his persoanl privilege. ... The framers of the constitutional guarantee against compulsory self-disclosure who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such originizations so as to nullify appropriate governmental regulation." Bellis v. United States, 94 S.Ct. 2179, 15 Cr.L. 3111, 3112-3113 (No. 73-190, decided May 28, 1974).

We submit, then, that the State of New York, in the

person of its policeman, could not avail itself of the 5th Amendment privilege because it had none under the law and Constitution as interpreted by this Court, and that even if the policeman's invocation of the privilege was proper for his persoanl protection,* the State has consequently deprived the defense of necessary and relevant information in its control and the conviction must be reversed.** Furthermore, the State, by initiating this prosecution and presenting to the courts seized evidence and a search warrant arguably valid on its face, having, in effect, gone forward with a prima facie attestation to the legitimacy of its action, has waived any 5th Amendment privilege as to the facts and underlying circumstances of the search and seizure. Its insistence on the 5th Amendment, or the insistence of its agent-witness, requires that its prima facie attestation be stricken and the evidence suppressed. Rogers v. United States, 340 U.S. 367 (1951); United States v. Cardillo, supra.

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* On information and belief, the police officer may already have testified before the State Grand Jury about the events of the search and seizure, and the items he confiscated, and he certainly made a return on the warrant, possibly sworn, which resulted in a waiver of his privilege. Rogers v. United States, 340 U.S. 367 (1951); United States v. Seewald, 450 F2d 1159, 1164 (2d Cir., 1971) cert. den. 405 U.S. 978; United States ex rel. Carthan v. Sheniff, 330 F2d 100 (2d Cir., 1964) cert. den. 379 U.S.929.

** If the People of the State of New York, who asked Bonino not a single question, wanted to get at the truth they could have demanded Bonino sign a waiver of immunity at pain of losing his position (New York City Charter §1123; New York State Constitution, Art.I, §6; Gardner v. Broderick, 393 U.S. 273, 275-276 (1968), or the state could have granted him immunity from prosecution in service of the higher purpose of getting at the truth in the prosecution the state had initiated (C.P.L. §50.10-50.30). Instead, the state opposed revealing the truth by repeatedly objecting to defense counsel's questions of Bonino, even after Bonino secured an attorney, and by introducing no evidence of their own.

Contrary to the opinion of the Courts of New York State, the officer's refusal to answer questions about his seizure of evidence from appellants' homes, and about his disposition of that evidence, and his clear statement of intention to refuse to answer whether the statements in his affidavit were truthful, deprived appellants of the opportunity to adequately meet their burden of proving the perjury and misconduct of this officer, and of doing it through his bias, motives and incredibility as a witness in court at the hearing and in his affidavit. The defense had gone forth with the testimony of other witnesses who happened, as will usually be the case, to be the defendants in the case and whom the trial court chose outright and expressly to disbelieve (See its opinion after the hearing, in Appellant's Appendix). The defense presented an attorney witness, an expert on gambling activities, who said the events could not have happened the way the officer said they happened, and whom the trial court disregarded. It was conceded that there had been Knapp Commission testimony about this officer and/a Federal Grand Jury investigation at which he had taken the 5th Amendment. But, the officer himself was the chief witness, especially since the trial court automatically discounted the evidence from the defendants. The defense had to call the chief witness, who was also their adversary and accuser, in a situation where the very issue to be determined was the veracity of this witness. In this sui generis circumstance ("In addition to the consideration that the interest of the United States in a criminal prosecution ... 'is not that it shall win a case, but that justice shall be done ...'..., the

ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." Campbell v. United States, 365 U.S. 85, 96 [1960), the State courts erroneously held to a narrow conception of the scope of the examination. The State courts ruled irrelevant questions designed to show misconduct directly related to the search warrant in question, misconduct and cheating which would, by any civilized standard of police conduct, make the witness unworthy of the office, let alone believable as a witness, misconduct that shocks the conscience by itself and to the extent that the courts amplify the miscarriage by ignoring it (cf., Rochin v. California, 342 U.S. 165 [1952]), and misconduct which, if true, required the officer to lie to his superiors about what he had seized, lie to the court on the return of the warrant, lie to the grand jury, and obviously lie to the trial court at the hearing, and misconduct, if true, that would clearly bear on his motives to falsify a search warrant to get at money and drugs which he had intention to steal. This was a hostile witness in the true sense of the term, and counsel, to be effective, had to be able to call him and examine and cross-examine him to give the fact-finder a true picture of the man who signed the warrant affidavit and to delve behind the officer's mere reading of the affidavit as his testimony.

The availability of the right to confront and

> to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. Chambers v. Mississippi,

410 U.S. 284, 297-298 (1973); See proposed Rules of Evidence 607.

And the Supreme Court has held that veracity, bias and motives are an essential ingredient of the right to cross-examination and that the cross-examiner should be given great leeway in the exploration of that subject. Alford v. United States, 282 U.S. 687 (1931); Davis v. Alaska, supra. Surely questions concerning the officer's prior bad acts connected specifically to the execution of the warrant he is alleged to have perjured, prior bad acts of perjury in this proceeding and bearing /on his motives to falsify the affidavit were not outside the scope of the right of cross-examination. United States v. Haggett, 438 F2d 396 (2d Cir. 1971) cert. den. 402 U.S. 946. Nor were those questions irrelevant to the ultimate substantive issue of the suppression of the evidence, even if one assumes they were immaterial to the specific validity of probable cause in the affidavit. Circuit Courts of Appeal have held recently that in cases of intentional misstatement of facts by a police affiant, regardless of the materiality of the fact to the finding of probable cause, the warrant will be invalidated and the evidence seized suppressed: "if deliberate government perjury should ever be shown, the court need not inquire as to the materiality of the perjury. The fullest deterrent sanctions of the exclusionary rule should be applied to such serious and deliberate government wrongdoing." United States v. Carmichael, 489 F2d 983, 989 (7th Cir., 1973); United States v. Thomas, 489 F2d 664 (5th Cir., 1973); United v. Gonzales, 488 F2d 833 (2d Cir., 1973)

The Supreme Court said in Davis v. Alaska, supra,

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A Wigmore Evidence §940, at 775 (Chadbourn rev. 1970). We have recognized that exposure of a witness' motivation in testifying is a proper and important function of the constitution. Greene v. McElroy, 360 U.S. 474, 496 (1959). 94 S.Ct. 1105 at 1110

The State Courts, in expressing their own disinterest in the answers to which the witness took the 5th Amendment, totally disregarded the possibility of "deliberate government wrongdoing," and appellants' right to cross-examination; the courts substituted their own prejudgment of the veracity of the witness before hearing all the facts that might bear on that judgment. Although we have argued that admission by the officer of the misconduct pursued in the unanswered questions would have required suppression as a matter of law, the cross-examiner's right to a reasonable lattitude to explore was also denied. Had admissions of the officer's illegal conduct been extracted in the examination in this case, there is no way to know exactly what effect this would have had on the rest of the witness' testimony or on the court's view of him. "To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of

the safeguards essential to a fair trial." Alford v. United States, 282 U.S. 687, 692 (1931):

> Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. Dennis v. United States, 384 U.S. 855, 874-875 (1965)

That the police officer's testimony concerning his theft of property from appellant's homes was not a collateral matter is illustrated by this Court's disposition of a similar collateral claim made by the government in United States v. Cardillo, supra. There, the defendants Harris and Karminsky were charged with transportation and receipt of stolen goods in interstate commerce. The main government witness, Friedman, testified that he loaned $5,000.00 to Harris to purchase the stolen goods; he refused on Fifth Amendment grounds to say pursuant to cross-examination where he got the $5,000.00, except that he had borrowed it. At first glance it might seem, as the government argued, that this fact was irrelevant to Harris' guilt of the crimes charged. However, this Court held that because the loan to Friedman was part of the specific chain of events leading to Harris' guilty involvement, incredibility as to Friedman's source of the money might have impugned the rest of his testimony more directly related to Harris.

> This financial transaction was not collateral but directly related to Harris' participation in the conspiracy and to Friedman's being present on the various occasions as to which

> he testified against Harris and Kaminsky ... If the proof were sufficiently convincing to induce a belief that the loan had never been made, the court's reaction to all of Friedman's testimony might have been so adverse that it would have accepted no part thereof. Disclosure of a direct lie relating to the events testified to might have had far more influence on the court's ultimate decision than testimony merely establishing the unsavory character of the witness by admission of prior crimes ... The answers solicited might have established untruthfulness with respect to specific events of the crime charged ... that refusal to answer thwarts a fundamental right of the defendant to cross-examine his accusers.
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> 316 F2d at 613

See also People v. Schneider, 36 N.Y.2d 708 (1975) relying on dissenting opinion at 44 A.D.2d 845. Thus, in the case at bar, the State of New York argues that the police officer's theft of property during the execution of the search warrant is irrelevant to whether or not he had probable cause to seek the warrant. Cardillo disposes of this contention and supports appellants' position in this case that, as part of the same transaction, the events leading up to and including the seizures in question, the theft committed on the authority of the search warrant, impugns not only the officer's testimony at the hearing, but his motives for seeking the warrant in the first place, and finally the warrant itself. Disclosure of this theft, we submit, would have led any objective trier of fact to accept no part of the officer's sworn testimony, including the sworn testimony that constitutes his search warrant affidavit.

Finally, it must be noted that the police officer indicated he would take the 5th Amendment if asked if his affidavit were

truthful.

> Q. Were you questioned in the federal grand jury concerning the truthfulness of the affidavit that you submitted in order to procure a search warrant in this case?
>
> A. As far as my recollection goes, I was not questioned on that. And if I was, I would have again invoked my constitutional privileges (41).

Thus, having once been put on notice by the witness that he intended to invoke the 5th Amendment as to that question before a judicial inquiry, the defense did not, as the State Courts would have it, fail in some duty to ask a question which they had every reason to believe would not be answered. Indeed, there is an affirmative duty on a trial examiner not to ask questions which he knows will elicit the invocation of the 5th Amendment privilege against self-incrimination. Bowles v. United States, 439 F2d 536 (D.C.Cir., 1970) cert. den. 401 U.S. 995. In any case, the defense was entitled to the evidence contained in the answers to the questions they did pose. Since the State deprived the defense of that evidence which, as we have argued, could have itself required suppression as a matter of law or, at least, severely damaged the credibility of the witness and led to other admissions by him, the State is not absolved of its due process obligation simply because the defense did not ask other questions following the State's refusal to cooperate. Since the State of New York chose to stand on the privilege the conviction should be nullified as the result of Constitutional rights deprivations. In the alternative, a hearing should be

ordered by this Court at which time the officer would be directed to answer the questions. Since the Courts of New York State, both the Supreme Court and the Appellate Division, have already concluded that the answers to the questions would not be considered relevant by them to the suppression of the evidence seized by the officer, even if the answers were admissions of his own larceny, corruption and prejury in this case, a full and fair hearing there was and is impossible. In the event a hearing is ordered by this Court, and the police officer continues to refuse to answer, the conviction should be vacated and appellants released from custody.

At the very least, this case should be remanded to the District Court to a different Judge for an adequate determination of these issues with a full and fairly developed record for this Court's possible review. It is clear from the non-opinions literally "handed" down by the Judge below, that no consideration was given to appellants' petition. The Judge was either unwilling or unable to do so. His goal was apparently to find against appellants with the least amount of effort. First he tried to pass off the case using overruled precedent, despite counsel's exposition of the existing law. Second, he wrote out the Appellate Division opinion and "accordingly" denied the petition. This was an abdication, not a decision. Under Brown v. Allen, 344 U.S. 443 (1953), the federal habeas judge must independently apply the correct constitutional standard to the "historical" facts underlying the constitutional claim. See also

Townsend v. Sain, 372 U.S. 293 (1963). Since the Judge only adopted the State application of constitutional standards, such as it was, the case should be remanded to a different Judge who will fulfill his constitutional and statutory function.

POINT II

THE FACTS PRESENTED BY THE OFFICER IN HIS AFFIDAVIT CONTAINED INSUFFICIENT PROBABLE CAUSE UPON WHICH A SEARCH WARRANT COULD ISSUE.

It is clear and well established law that in order for a search warrant to issue, the underlying affidavit must provide a sufficient basis for a finding of probable cause. Anguilar v. Texas, 378 U.S. 108. The good faith of the police officer is not enough when the information is too subjective or conclusory. Beck v. Ohio, 379 U.S. 89. The observations must objectively constitute probable cause before a warrant may issue, Spinelli v. United States, 393 U.S. 410, and suspect activity, no matter how reasonable the officer's belief, does not amount to probable cause under the 4th Amendment. Sibron v. New York, 392 U.S. 40.

The officer's statements are required to be of such objective detail that a magistrate may independently make a judicial determination of the existence (or non-existence) of probable cause. Draper v. United States, 358 U.S. 307.

Upon an examination of the facts as presented to the Court by the officer, we can conclude no more than the following:

a) With regard to the St. Albans premises, Sims was seen to leave and return to his residence on three consecutive days. On one of those days, numerous unknown males were seen to come to his door and give him brown envelopes.

b) With regard to the Jamaica premises, on three consecutive days, Sims was seen being driven to this house and remaining there for a period of hours. On the first occasion, he left and returned to his own home (the St. Albans premises) with a brown paper bag. The unknown callers at St. Albans were not held out to have been gamblers, nor was there any hint of additional facts supplied by an informant.

The officer concluded that the various brown envelopes delivered to the Sims home by numerous unknown males were like those commonly used by policy collectors, but indicated no identifying marks, or anything that would characterize or distinguish them from any other brown envelope. In short, the factual basis for this conclusion was not spelled out in the warrant. He reported no overheard conversations between Sims and these other unknown males and no passing of money or anything other than these equivocal envelopes.

Sims was "known" to the officer to be involved in policy operations. This conclusion is buttressed only by the fact that the officer reported that he had been arrested for these charges in the past. There is no mention made of any convictions emanating from these claimed arrests.*

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*The facts upon which the officer draws his conclusions that Stanley Sims has a listing of gambling arrests are not specified in the affidavit: a) the affidavit does not state that he personally made the arrests; b) the affidavit does not state that he spoke to any arresting officer.

The statement that Sims was a known gambler is a "bald and unilluminating assertion of suspicion [that] is entitled to no weight." Spinelli v. United States, 393 U.S. 410, 414 (1969).

The underlying affidavit is virtually barren of any facts from which the magistrate could independently conclude that there was any form of contraband in the brown paper bag carried out of the Jamaica premises, or in the brown envelope allegedly delivered to the St. Albans premises.

The sole basis for suspicion of the Jamaica premises was this innocuous brown paper bag and Sims' visits for a few hours on three successive days, prior to his return home and the coming of various unknown males to his door with "brown envelopes". It cannot be suggested that these brown envelopes or paper bags give rise to sufficient probable cause for the issuance of a warrant to search either premises.

In a similar situation, discussing the common use of brown envelopes to transport marijuana, the Court of Appeals, per Keating, J., held that:

> The argument is defective because the envelopes could have contained any number of non-contraband items. This is in sharp contrast to the translucent glassine envelope which has come to be accepted as the tell-tale sign of heroin. Still even in the case of the glassine envelope it has never been held that mere passing of such envelope established probable cause. We conclude, therefore, that the testimony concerning the use of these common envelopes for marijuana does not raise the level of inference from suspicion to probable cause.

* * * *

> Thus, where a layman would see absolutely nothing suspicious about the envelopes and the events preceding the arrest, the officer was surely entitled to use his expertise to the contrary. It does not follow, however, that the officer is entitled to draw the inference of criminality when others, possessed of the same special knowledge or expertise, would not. People v. Corrado, 22 N.Y.2d 308, 313-314 (1969).

In determining the reasonableness of a search and seizure, due weight must be accorded to the specific reasonable inferences which a police officer is entitled to draw from the objective facts or the lack of them. Terry v. Ohio, 392 U.S. 1, 21 (1968); People v. Merola, 30 A.D.2d 963 (2d Dept., 1968).

Even if it were to be assumed that the affidavit states sufficient facts to authorize the issuance of a search warrant for one of the premises mentioned, if the affidavit is insufficient to the other, it is insufficient as to both. People v. Rainey, 14 N.Y.2d 35, 37 (1968); People v. Lawrence, 31 A.D.2d 712,714 (3rd Dept., 1968); United States v. Hinton, 219 F2d 324.

Even if the Court concludes that these "brown envelopes" gave rise to sufficient probable cause to believe that Sims was involved in gambling activities, there is nothing to indicate that the automobile or the Cameron premises in Jamaica, also mentioned in the warrant, were in any way involved in any illegal activities.

Sims was never seen to transport these suspicious "brown envelopes" in the automobile, or in any way deliver them to the Cameron premises. In fact, according to the police observations, the brown envelopes were not in Sims' possession until after he returned from Cameron's home. The only thing Sims was ever seen

to transport from the Cameron residence was a common brown paper bag. Certainly, even if it is held that a brown envelope has infamous connotation, the transportation of a common ordinary shopping bag can be held to be nothing more than total equivocal conduct.

However, since the activity as observed by the affiant is just as consistent with innocent conduct as criminal conduct, the warrant in this case should have been contraverted, and the evidence seized as a result suppressed. Spinelli v. United States, supra; United States v. DiRe, 332 U.S. 581 (1948); United States v. Viale, 312 F2d 595 (2d Cir., 1963) cert. den. 373 U.S. 903; Perry v. United States, 336 F2d 748 (D.C.Cir., 1964); Mangaser v. United States, 335 F2d 971 (9th Cir., 1964).

As the Court of Appeals of New York has recently stated:

> Although the observed acts of the defendant and the suspected narcotic addict were not inconsistent with a culpable narcotics transaction, they were also susceptible of many innocent interpretations, even between persons with a narcotics background. The behavior, at most 'equivocal ans suspicious', was not supplemented by any additional bahavior raising 'the level of inference from suspicion to probable cause.' (See People v. Corrado, 22 N.Y. 2d 308, 311, 313.)
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> Thus, for example only, there was no recurring pattern of conduct sufficient to negate inferences of innocent activity. (cf. People v. Smith, 21 N.Y.2d 698; People v. Valentine, 17 N.Y.2d 128, 132); no overheard conversations between the suspects that might clarify the acts observed (cf. People v. Cohen, 23 N.Y.2d 674, 695), no flight at the approach of the officer (cf. People v. White, 16 N.Y.2d 270), and no misstatements when questioned about observed activity (People v. Brady, 16 N.Y.2d 186).
>
> The logical and practical problem is that even accepting ungrudgingly, as one should, the police

> officer's expertness in detecting a pattern of conduct characteristic of a particular criminal activity, the detected pattern, being only the superficial part of a sequence, does not provide cause for arrest if the same sketchy pattern occurs just as frequently or more frequently in innocent transactions. The point is that the pattern is equivocal and is neither uniquely associated with criminal conduct, and unless it is there is no probable cause. People v. Brown, 24 N.Y. 2d 421, 423-424 (1969). See also People v. Malinsky, 15 N.Y.2d 86 (1965).

It goes without saying that any pattern of conduct observed and noted by affiant with regard to the St. Albans premises was equivocal at best, and nothing at all could possibly be said to have transpired of a criminal nature in the automobile or at Jamaica.

In Spinelli v. United States, 393 U.S. 410, the affidavit stated that the FBI had observed the defendant's movements for five days, and that on four of these days he had been seen to park his car at some time 3:30 and 4:45 P.M. in a parking lot of an apartment house, and on one particular day he was seen to enter a particular apartment. The FBI checked with the telephone company and established that the apartment had two telephones. The affidavit also stated that Spinelli was known to the FBI agent and to Federal law enforcement agents to be a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers. These facts alone, the Supreme Court said, signified nothing in the way of probable cause.

The Supreme Court added that there is nothing unusual about having two phones in an apartment and there was no abnormal activity observed when Spinelli went to the apartment. An

unusual number of telephones might have been of significance as would the appearance of a number of convicted gamblers at the premises. Finally, the fact that Spinelli was "known as a gambler" was of no help. The undescribed suspicions about a person's reputation "may [not] be used to give additional weight to allegations that would otherwise be insufficient" (393 U.S. 418-419, supra). It followed, therefore, that the Magistrate was not authorized to issue a search warrant on that affidavit.

POINT III

THE ABOVE QUESTIONS HAVING BEEN PRESENTED TO THE COURTS OF NEW YORK STATE AND APPELLANTS CONTENTION HAVING BEEN REJECTED, AND THERE BEING NO PRESENTLY AVAILABLE STATE PROCEDURE BY WHICH TO SEEK FURTHER RELIEF, APPELLANTS' HAVE EXHAUSTED STATE REMEDIES.

As is apparent from reading of the brief submitted by appellants in the Appellate Division of the State of New York* and from a reading of the opinions of the Supreme Court of the State of New York, Queens County, and the Appellate Division,** the State of New York was presented with the substance of the allegations of Constitutional rights deprivations set out and analyzed in Points I and II, supra. The Court of Appeals of the State of New York, presented with the same arguments, refused to grant leave to review the decision of the intermediate appellate court, thereby ending the State appellate process. Any opportunity for post-conviction collateral relief was also thereby foreclosed.

> The court must deny a motion to vacate a judgment when: The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the

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* Pertinent portions of the brief and opinions are set out in Statement of Facts, supra, and the brief is filed as an exhibit.

** Pertinent portions of the opinions are set out in the Statement of Facts, supra, and the full opinions are appended.

> judgment ...; or although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing ... to [the defendant's] unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him ..." N.Y.C.P.L. §440.10 (2)(a), (c).

In addition to the point on the absence of probable cause, the substance of appellants' argument in the State courts was that they were deprived of a fair hearing by the State, through its recalcitrant police-agent who refused evidence on the ground of personal 5th Amendment privilege, and that because this was a police-agent of the State who was invoking the privilege and depriving appellants of the very evidence necessary to meeting their burden on the hearing, that burden ought to have been held to have been met, i.e., since the police officer had custody, in his testimony, of the crucial evidence on the issue of his own perjury, and declined to give it, either his perjury must held to have been established, or, at least, the defendants could not be faulted for failing to produce this evidence, and their motion had to succeed. Although not each Constitutional deprivation resulting from the courts' failure to uphold these arguments was specifically listed, "'the ultimate question for disposition', ... will be the same despite variations in the legal theory ... urged in its support." Picard v. Connor, 404 U.S. 270, 277 (1971). Indeed, the New York Courts rejected all possible Constitutional arguments when they held that the testimonial evidence sought from, and withheld by, the police officer

was totally irrelevant to the issues on the hearing, even if the answers were admissions to larceny, corruption, and false statements to his superiors and in the return on the warrant, all directly related to the search and seizure in this case.

> Even assuming, arguendo, that proof had been adduced of criminal acts of the police officer during or subsequent to the making of the affidavit, the conslusion that the affidavit was perjurious would be without foundation. (Opinion of the Supreme Court, Queens County, See Appendix).
>
> No one can hold a brief for a police officer who, in a judicial inquiry, refuses to answer questions about the performance of his duties on the ground that his answers might be incrimination. However, as Mr. Justice Brennan pointed out, all of the police officer's refusals to answer dealt with occurrences which took place <u>after</u> the seizure under the warrant; <u>none of them dealt with the truthfulness of the affidavit upon which the warrant was obtained</u>. The record is crystal clear that he was examined in great detail about the contents of his affidavit and answered every question asked him with respect to that. <u>People v. Cameron, supra</u>. (Emphasis the Court's)

Thus, any assertion that appellants failed to fairly and substantially present their claims to the State courts is without foundation. Even if such an assertion be accepted, however, there are no presently available State remedies for the presentation or re-presentation of those claims, according to C.P.L. §§440.10 (2)(c), <u>supra</u>, which precludes post-conviction remedy for claims which could have been, but were not, presented on direct appeal. In such a situation, this Court, applying the plain meaning of 28 U.S.C. §§2254 (b)*, has held that a petition

---

*" An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it

(See next page)

for federal habeas corpus relief will be entertained.

> The substantive facts, however, were called to the attention of the state trial court and the issue was raised there though perhaps not as precisely as it was subsequently on appeal. On review the Appellate Division has the duty of reviewing the appellate record in determining whether errors had been preserved so as to warrant reversal 'upon the facts' or 'in the interest of justice,' see N.Y.C.P.L. §470.15, and the question was raised in the brief there, ... Where the record shows that a state prisoner has raised an issue on appeal, then a proper exhaustion of state remedies has taken place, irrespective of whether an appellate opinion has been written indicating this fact ... Moreover, no state collateral remedy would be available in the event he were held notto have raised the question on appeal since under the New York Criminal Procedure Law, §440.10 subd. 2(c), a motion to vacate a judgment must be denied where sufficient facts appear in the record to have permitted adequate appellate review of an issue where the issue was not raised on appeal. United States ex rel. Leeson v. Damon, 496 F2d 718, 720-721 (2d Cir., 1974).**

---

* appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

** Furthermore, there is no deliberate by-pass of state procedures in "the inadvertent failure to raise a constitutional claim at the appropriate juncture," Frazier v. Roberts, 441 F2d 1224, 1230 (8th Cir., 1971), or in a situation where counsel, not the petitioners themselves "simply overlooked" a possible Constitutional ground for reversal, United States ex rel. Vanderhorst v. LaVallee, 417 F2d 411, 413 (2d Cir., 1969)(en banc), especially where there is no evidence in the record to support any accusation of a trial or appellate strategy of avoidance which "backfired." Henry v. Mississippi, 379 U.S. 443 (1965).

CONCLUSION

FOR THE ABOVE STATED REASONS, THE ORDERS OF THE DISTRICT COURT SHOULD BE REVERSED AND WRITS OF HABEAS CORPUS SHOULD ISSUE COMMANDING APPELLANTS' RELEASE FROM STATE CUSTODY AND THE VACATUR OF THEIR CONVICTIONS, OR, IN THE ALTERNATIVE, THE CASE SHOULD BE REMANDED TO A DIFFERENT DISTRICT JUDGE FOR A FULL AND FAIR SUPPRESSION HEARING OR FOR A PROPER ADJUDICATION OF THE PETITION.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

	Page
District Court Docket Entries	1
Search Warrant Affidavit	5
Opinion of New York Supreme Court (Brennan, J.) dated 1/26/72	8
Opinion of Appellate Division, 40 A.D.2d 1035	12
Opinion of New York Supreme Court (Brennan, J.) dated 8/14/73	15
Opinion of Appellate Division, 44 A.D.2d 355	30
Order Denying Leave To Appeal to Court of Appeals of New York (Wachtler, J.)	35
Petition for Writs of Habeas Corpus	37
Memorandum and Order Denying Petitions for Writs of Habeas Corpus (Bruchhausen,D.J.) 3/20/75	51
Counsel's Letter to Judge Bruchhausen, 3/21/75	55
Supplemental Memorandum and Order Denying Petition for Writs of Habeas Corpus (Bruchhausen, D.J.) 3/31/75	58
Notice of Appeal	63
Order Denying Certificate of Probable Cause (Bruchhausen, D.J.) 4/15/75	65
Order Granting Certificate of Probable Cause, (Court of Appeals, 2d Circuit) 5/9/75	67

DISTRICT COURT DOCKET ENTRIES

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PLAINTIFFS

CAMERON, EDITH MAY
EDITH MAY CAMERON
SIMS, STANLEY TAYLOR
STANLEY TAYLOR SIMS
DAVIS, KENNETH
KENNTH DAVIS
WILLIAMS, ROBERT STEWART
ROBERT STEWART WILLIAMS
CAMERON, MARVIN
MARVIN CAMERON
SIMS, JENNIE
JENNIE SIMS

DEFENDANTS

CHARLES FASTOFF, Director, N.Y.C. Department of Probation; WALTER DUMBAR, NY State Director of Probation; JOHN KLEIN, Chief Probation Officer, Queens County; THOMAS AGRESTA, Presiding Justice Supreme Court, Criminal Term, Que County; LEON J. VINCENT, Warden, Green Haven Correctional Facility Stormville, N.Y.; J.EDWIN LAVALLEE, Warden, Clinton Correctional Facility, Dannemora N.Y.; JAMES THOMAS, Warden, New York City Correctional Institut for Men, Rikers Island, N.Y. and HAROLD J. SMITH, Warden, Attica Correctional Facility, Attica, N.Y.

CAUSE

HABEAS CORPUS

ATTORNEYS

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299 Broadway,N.Y.C.,N.Y.10007
Tel: (212) 349-5554

LOUIS J. LEFKOWITZ,
Attorney General, State of N.Y.
2 World Trade Center,N.Y.,N.Y.

75-2075

CHECK HERE IF CASE WAS FILED IN FORMA	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
				JS-5	
				JS-6	✓

C 167 U.S.A. ex rel. EDITH MAY CAMERON, ET AL vs. CHARLE FASTOFF, et al

	NR.	PROCEEDINGS
5-75		PETITION FILED FOR WRITS OF HABEAS CORPUS, etc. (1)
4-5-75		BY BRUCHHAUSEN, J: ORDER TO SHOW CAUSE FILED why writ of habeas corpu should not issue, etc. (Re: EDITH CAMERON & JENNIE SIMS _ returnable Feb. 18, 1975 at 10:00 A.M.) (2)
2-5-75		BY BRUCHHAUSEN, J. ORDER TO SHOW CAUSE FILED, ETC. (Re: EDITH CAMERO & JENNIE SIMS, etc.) returnable Feb. 18, 1975 at 10:00 A.M. (3)
2-5-75		BY BRUCHHAUSEN, J. ORDER TO SHOW CAUSE FILED, ETC. (Re: STANLEY TAYLOR SIMS) returnable Feb. 18, 1975 at 10:00 A.M. (4)
2-5-75		BY BRUCHHAUSEN, J. ORDER TO SHOW CAUSE FILED, ETC. (Re: EDITH Cameron & JENNIE SIMS) returnable Feb. 18, 1975 at 10:00 A.M. (5)
2-5-75		BY BRUCHHAUSEN, J. ORDER TO SHOW CAUSE FILED, ETC. (Re: MARVIN CAMERON) returnable Feb. 18, 1975 at 10:00 A.M. (6)
2-5-75		BY BRUCHHAUSEN, J. ORDER TO SHOW CAUSE FILED, ETC. (RE: ROBERT STUART WILLIAMS) returnable Feb. 18, 1975 at 10:00 A.M. (7)
2-5-75		BY BRUCHHAUSEN, J. ORDER TO SHOW CAUSE FILED, ETC. (Re: KENNETH DAVIS, ETC.) returnable Feb. 18, 1975 at 10:00 A.M. (8)
2-5-75		MEMORANDUM OF LAW FILED. (9
2-10-75		Affidavits (7) of Domenick J. Porco, re service of order to show cau upon CHARLES FASTOFF, WALTER DUMBAR, LEON J. VINCENT; JOHN KLEIN; HAROLD J. SMITH; JAMES THOMAS; and upon J. EDWIN LAVALLEE (attache to their respective orders. etc.
3-14-75		Before BRUCHHAUSEN, J. Case called. DECISION RESERVED.
3-20-75		Notice of motion filed to amend petition to substitute as a respond party the Honorable Harold Smith, Superintendent of Attica Correcti Facility, for the previously named respondent party, Leon J. Vincent Warden, etc. 1C
3-20-75		BY BRUCHHAUSEN, J. MEMORANDUM and ORDER FILED. ORDERED that the pe be and they are hereby DISMISSED. Copies will be forwarded to the attorneys for the parties. (See Memo., etc.) from chambers, etc. (
3-21-75		BY THE CLERK: JUDGMENT FILED. Petitioners take nothing of the re spondents and the PETITIONS ARE DISMISSED. (
3-31-75		BY BRUCHHAUSEN, J. MEMORANDUM and ORDER, SUPPLEMENTAL to the Memo (order dated March 20, 1975, filed. ORDERED that the PETITION be a it is hereby DISMISSED. Copies will be forwarded to the attorneys the parties, by secretary to BRUCHHAUSEN, J.
4-7-75		Notice of motion filed for an order granting petitioners a Certifi of Probable Cause, etc. (returnable April 14, 1975) (
4-11-75		NOTICE OF APPEAL FILED.
4-11-75		Copy of Notice of Appeal was on this day mailed to Hon. Louis J. Lefkowitz, Atty., Gen., State of N.Y., etc. and a Copy was also mail to Clerk, U.S.C.A.
4=11=75		Copy of Notice re Record, etc., together with Forms C and D (as req for filing in U.S.C.A.) were on this day mailed to DILLER & SCHMUKL

, CONTINUATION SHEET

	DEFENDANT	DOCKET NO. 75-C-167
.S.A. ex rel. EDITH MAY CAMERON, et al	CHARLES FASTOFF, Director, N.Y.C., etc.	PAGE 2 OF --- PAGES

PROCEEDINGS

DATE	NR.	PROCEEDINGS
4-14-75		Before: BRUCHHAUSEN, J. MARKED "SUBMITTED"
4-15-75		BY BRUCHHAUSEN, J. Motion for a Certificate of Probable Cause is DENIED. IT IS SO ORDERED. (See Order endorsed upon document #14) (16)
5-14-75		Copy of CIVIL APPEAL SCHEDULING ORDER FILED.

A TRUE COPY
ATTEST
DATED June 4, 1975
LEWIS ORGEL
CLERK
BY Marie McCarthy
DEPUTY CLERK

DC-111A (Rev. 1/

SEARCH WARRANT AFFIDAVIT

(Officer Bonino)

Affidavit for Search Warrant
Sec. 781-a C.C.P.

#306

Criminal Court of the City of New York

Part One A, County of Queens

State of New York } ss.:
County of Queens }

Patrolman Lucido Bonino, Shield 7514, 16th Division

being duly sworn, deposes and says:

1. I am a Police Officer assigned to Plainclothes Duty in the 16th Division New York City Police Department.

2. I have information based upon the following:

Based on my knowledge and experience as a plainclothes officer assigned to gambling investigations, I made the following investigation and observations: On Tuesday, May 18, 1971, at about 1110 hours, while on patrol and in the area of my assigned Location Prone to Public Moral's Violations, I did observe said Stanley Sims, A Known Gambler, known to me to be involved in illegal Policy operations, leave his residence 197-01 116th Avenue, St. Albans, New York, and enter a 1970 Plymouth, license PZ6368(NY). Seated behind the wheel of the Plymouth was an unknown Male Negro. After Stanley Sims entered, the driver pulled out from the curb and drove said vehicle towards Jamaica, New York. I followed said vehicle to 145-40 New York Boulevard, Jamaica, New York. Unknown Male Negro parked said vehicle infront of 145-40 New York Boulevard and both he and Stanley Sims departed from said vehicle and entered said premises. I kept 145-40 New York Boulevard under observation from approximately 1130 hours to 1430 hours. During this period of time, approximately six unknown male negros entered premises and and remained therein. At approximately 1430 hours, Stanley Sims and the unknown male driver of above vehicle departed from premises, proceeded to vehicle entered same and they drove away. I followed said vehicle to Stanley Sims' residence. Driver of vehicle parked said vehicle and both he and Sims got out of vehicle and entered Sims' residence. I observed that Sims was carrying a large paper bag when he departed from the premises 145-40 New York Blvd., and when he entered his residence, he was carrying the same paper bag. I kept Sims' residence under observation from 1455 to 1530 hours, and during this period of time, I observed numerous unknown males approach premises, knock on the front door and door was answered by Stanley Sims. After a short conversation with Sims, each of these unknown Males handed him brown envelopes (envelopes of the kind which are used by policy collectors), and departed from the area.
On Wednesday, May 19, 1971, at 1115 hours, I went to Stanly Sims residence and at approximately 1125 hours, Stanley Sims departed from his residence, walked to the curb where the above 1970 Plymouth, PZ6368(NY) was parked. The same unknown Male Negro was seated behind the wheel of said Vehicle.

3. Based upon the foregoing reliable information and upon my personal knowledge there is probable cause to believe that such property

and may be found in the possession of

or at premises

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, in the form annexed, authorizing the search of

and directing that if such property or evidence or any part thereof be found that it be seized and brought before the

Sims entered said vehicle and both he and the unknown Male negro drove towards Jamaica. I kept said unknown Male and Stanley Sims under observation from 1125 to 1545 hours on this date and they both repeated the operation of the first day to the letter. 7

On Thursday, May 20, 1971, at 1130 hours, I again went to Stanley Sims residence and at approximately 1145 hours, Stanley Sims departed from his residence, walked to the curb where the same 1970 Plymouth was parked, with the same unknown Male Negro seated behind the wheel of said vehicle. Again Sims entered vehicle and both he and the unknown Male drove towards Jamaica, New York. I kept said unknown Male and Stanley Sims under observation from 1145 to 1500 hours and again they repeated the operation of the first day to the letter.

A check with the Motor Vehicle Bureau, discloses that said vehicle is registered to Oscar Thomas at 18-27 201st Street, Queens, New York and calls for a 1970 Green Plymouth, License PZ6368.

Stanley Sims is known to the New York City Police Department under Known Gambler Serial Number 4993, B224458 and has a record of 15 arrests for Policy Violations most of which are for Controller of a Policy Operation.

In my opinion as an expert qualified by the Courts on Policy, my investigation and observations lead me to believe that the above described Stanley Sims and the "John Doe" Male Negro (driver of 1970 Plymouth), are receiving and accepting wagers on Policy inside the aforementioned Premises.

3. Based upon the foregoing reliable information and upon my personal knowledge there is probable cause to believe that such property, namely: written records of wagers on Mutual Race Horse Policy numbers and other paraphernalia commonly used in illegal Policy, are possessed and/or concealed in violation of 225.05 of the Penal Law. and may be found in the possession of Stanley Sims and or "John Doe" (Male, Negro) driver of 1970 Plymouth.

or at premises 197-01 116th Avenue, 145-40 New York Boulevard and/or 1970 Green Plymouth, License PZ6368(NY)

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, in the form annexed, authorizing the search of persons, premises and vehicle above,

and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

No previous application in this matter has been made in this or any other court or to any other judge, justice or magistrate.

Lucido Bonino, Shield 7514, Det. 16th Det.
Police Officer *Shield* *Rank* *Command*

Sworn to before me
May 21, 1971 19

Judge

OPINION OF NEW YORK SUPREME COURT

(Brennan, J., dated 1/26/72)

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART XII

THE PEOPLE OF THE STATE OF NEW YORK : BY: WILLIAM C. BRENNAN,J.

-against-

DATED: January 26, 1972

EDITH CAMERON, STANLEY SIMS, KENNETH DAVIS, ROBERT WILLIAMS, MARVIN CAMERON, : Ind.No. 2115/71
2116/71

Defendants. :

This is a motion for an order directing that a hearing be held to controvert a search warrant and suppress the evidence.

A prior motion for the same relief was granted by Mr. Justice Albert H. Bosch to the extent that a hearing was ordered to be held immediately prior to trial. Defendants then waived the hearing. On this application, their attorney states that no factual questions were raised, oral argument was heard and memorandum submitted on legal issues only, that for purposes of that argument it was assumed, and not conceded, that the facts in the affidavit upon which the warrant was issued were true. Mr. Justice Frank O'Connor, by decision dated November 30, 1971, denied the motion to suppress.

Defendant's attorney now on the instant application states that it has come to his attention that as a result of testimony before the Knapp Commission by Patrolman Phillips, a Federal Grand Jury has been convened to exmanine questions specifically related to the conduct of the arresting officers in this case, and that upon information and belief, all the officers in this

in this case refused to testify before the Grand Jury on the basis of the possibility of self incrimination, and further upon information and belief, the affidavit upon which the warrant was issued contained perjured testimony. The attorney does not say in what respect he claims the testimony is perjured or give any facts.

In his affidavit and in opposition, Assistant District Attorney Cornelius J. O'Brien states that he telephoned Assistant United States Attorney Edward M. Shaw at his office in the United States Court house, Southern District of New York and that Mr. Shaw told him that while it is true that two police officers connected with this case were called before a Grand Jury, the testimony sought had nothing whatsoever to do with their conduct in the case before this Court. Mr. O'Brien states further that the Queens District Attorney's office has received no information concerning appearances by any of the police who participated in this case before any other Grand Jury.

The defendants and their attorney know best whether or not there was any perjury in the affidavit in support of the application for the warrant. Nevertheless, the affidavit in support of this application is not only barren of facts with respect thereto but also entirely lacking reference to any one or more respects in which it is claimed the affidavit of the officer, on the application for the warrant, is perjurious. This Court is not determining whether or not any inferences of the truth of its contents may be drawn from the waiver of the hearing. Defendants' failure to state any facts in support of this application, as

distinguished from general unsupported statements, which are contradicted by the District Attorney compels denial.

The motion is in all respects denied.

Order entered accordingly.

The Clerk of the Court is directed to mail a copy of the decision and order to the attorney for the defendants.

/s/ WILLIAM C. BRENNAN

J.S.C.

OPINION OF APPELLATE DIVISION

40 A.D.2d 1035

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. EDITH M. CAMERON, STANLEY T. SIMS, KENNETH DAVIS, ROBERT S. WILLIAMS, MARVIN CAMERON, and JENNIE SIMS, Appellants.-- Appeal from six judgments of the Supreme Court, Queens County, all rendered May 15, 1972 (one as to each defendant), convicting them of criminal possession of a dangerous drug (in varying degrees) etc., upon guilty pleas and imposing sentences. The appeal brings up for review two orders of the same court, dated November 30, 1971 and January 25, 1972, which, respectively, denied their two successive motions to suppress evidence. Cases of the six defendants remitted to the Criminal Term for a hearing and a new determination on defendants' motion to suppress evidence on the ground that statements contained in the affidavit upon which the search warrants were issued were perjurious. In the interim, the appeals will be held in abeyance. On May 21, 1971 three search warrants were issued and executed upon a affidavit by a police officer which described certain activities of defendant Stanley Sims observed during three periods of surveillance and which alleged that a policy operation was being conducted. Defendants moved to controvert the warrants and to suppress the evidence seized. The right to a hearing was waived and the motion was argued solely on the ground of the legal sufficiency of the underlying affidavit. The motion was denied by order of November 30, 1971. In our opinion, the Criminal Term properly found that the statements contained in

the affidavit made a sufficient showing of probable cause to justify the issuance of the warrant (People v. Smith, 21 NY 2d 698; People v. Valentine, 17 NY 2d 128; People v. Meyers, 38 AD 2d 484; People v. White, 16 NY 2d 270; United States v. Ventresca, 380 US 102, 108-112). Defendants subsequently moved to suppress the evidnece seized on the ground that the affidavit contained perjured testimony and requested a hearing on that issue. The motion was supported by an affirmation by defense counsel stating, upon information and belief, that as a result of testimony given before the Knapp Commission a Federal Grand Jury had been convened to inquire into the conduct of the arresting officers in this case; that the officers had refused to testify on the ground of self-incrimination; and that the affidavit upon which the warrant had been issued contained perjured testimony. In opposition, the People stated that the United States Attorney's Office had informed them that although officers involved in this case had been called before a Grand Jury, the testimony sought had nothing to do with their conduct in this case. The motion was denied by order of January 25, 1972. In our opinion, a hearing should have been granted upon defendants' allegations of perjury. A search warrant may be attacked on the grounds of perjury in the underlying affidavit (People v. Alfinito, 16 NY 2d 181). Defendants' allegations with respect to the proceedings before the Knapp Commission and the subsequent Grand Jury proceedings were not conclusively refuted by the People. However tenuous

the grounds in support thereof, the specter of police corruption was raised here and justice required a hearing at which the facts could be fully aired. We note that upon the hearing ordered herein the burden of proof will be on defendants and any fair doubt arising from the testimony at the hearing is to be resolved in favor of the warrant (People v. Alfinito, supra, p. 186). Shapiro, Acting Pr.J., Gulotta, Christ, Brennan, and Benjamin, JJ., concur.

OPINION OF NEW YORK SUPREME COURT

(Brennan, J., dated 8/14/73)

SUPREME COURT, QUEENS COUNTY
CRIMINAL TERM, PART XII

THE PEOPLE OF THE STATE OF NEW YORK

-against-

JENNIE SIMS

and

EDITH CAMERON, et al.

Defendants.

BY WILLIAM C. BRENNAN, J.

DATED August 14, 1973

Ind. No. 2116/71 (Sims)
2115/71 (Cameron et al)

On appeal from six judgments of this Court all rendered May 15, 1972 (one as to each defendant) convicting them of criminal possession of a dangerous drug upon guilty pleas, the Appellate Division rendered its decision on December 29, 1972 (People v. Cameron et al, 40 A D 2d 1034). With respect to two orders of this Court denying successive motions to suppress evidence, the cases were remanded to this Court for a hearing and a new determination on defendants' motion to suppress evidence on the grounds that statements contained in the affidavit upon which the search warrants were issued were perjurious.

In question were three search warrants issued and executed on May 21, 1971, upon an affidavit executed by police officer Lucido Bonino which described certain activities of defendant Stanley Sims observed during three periods of surveillance and which alleged that a policy operation was being conducted. On defendants' motion to controvert the warrants

and to suppress the evidence seized, the right to a hearing was waived and the motion was argued solely on the grounds of legal sufficiency of the underlying affidavit. The Appellate Division has upheld the finding of a sufficient showing of probable cause to justify the issuance of the warrants.

A subsequent motion was made to suppress the seized evidence on the grounds that the affidavit contained perjured testimony and requesting a hearing on that issue. In support of such motion, defendants' counsel in his affirmation stated, upon information and belief, that as a result of testimony given before the Knapp Commission a Federal grand jury had been convened to inquire into the conduct of the arresting officer in this case, that the officer had refused to testify on the grounds of self-incrimination and that the affidavit upon which the warrants had been issued contained perjured testimony. In opposition, the People stated that the United States Attorney's office had informed them that although the officers involved had been called before the Grand Jury, the testimony sought had nothing to do with their conduct in this case. The motion was denied in this Court by order dated January 25, 1972.

In its decision the Appellate Division stated:

> "In our opinion, a hearing should have been granted upon defendants' allegations of perjury. A search warrant may be attached on the grounds of perjury in the underlying affidavit (People v. Alfinito, 16 N Y 2d 181). Defendants' allegations with respect to the proceedings before the Knapp Commission and the subsequent grand jury proceedings were not conclusively refuted by the People. However tenuous

the grounds in support thereof, the specter of police corruption was raised here and justice required a hearing at which the facts could be fully aired. We note that upon the hearing ordered herein the burden of proof will be on defendants and any fair doubt arising from the testimony at the hearing is to be resolved in favor of the warrant (People v. Alfinito, supra, p. 186)."

Accordingly, a hearing was held on June 5th, 6th and 7th, 1973. Defendants called as their first witness the police officer who had made and executed the affidavit, Lucido Bonino, Shield No. 5714, a member of the New York Police Department for 10 years, active in plain clothes investigation of gambling activities for about three years. The officer was questioned concerning his activities and observations on May 18, 1971. He said that he knew defendant Stanley Sims from pictures, previous observation and that he had been pointed out by a fellow officer; that he had observed the said defendant go in a Plymouth car to premises 145-50 New York Boulevard, Jamaica, New York, the residence of defendants Cameron. When asked whether he had been subpoenaed before a Federal grand jury to testify in this case the officer answered "No". (Minutes, p. 19) The following exchange ensued:

(By defendants' counsel)

"Q Did you appear before a federal grand jury in connection with your investigation and duties in connection with the Stanley Sims investigation?

A That's the federal grand jury you are asking now?

Q I said the federal grand jury.

A And this is with my investigation of Stanley Sims?

Q In other words, you work in connection with your, investigation of Stanley Sims, what preceded the arrest, the arrest and what followed the arrest.

THE WITNESS: Your Honor, I request to take the Fifth Amendment on this question."

Following a recess, the witness returned, accompanied by Leon Washor, Esq., his own attorney. The Court read the question and answer (Minutes, p. 28) and asked:

"THE COURT: Did you want that question repeated?

MR. WASHOR: I will let counsel conduct his own examination.

MR. MOSLEY: I would object to the form of the question. It is three questions in one.

THE COURT: At this point then the objection is sustained and the answer is stricken.

Continue, Mr. Diller.

MR. DILLER: I didn't ask any questions.

THE COURT: He is objecting to the last question I just read.

MR. DILLER: There was no objection made at that time, and an objection would be untimely if made at the present time.

THE COURT: I will permit the objection and I will sustain the objection. The answer is stricken. If you wish to reframe the question you may. Let us continue."

After some colloquy, counsel for defendants continued. (Minutes, p. 30).

"Q Were you subpoenaed to testify before a federal grand jury in connection with Stanley Sims?"

(Further colloquy)

"A I was subpoenaed before a federal grand jury. In reference to the Sims case, I would have to say no, not directly.

Q You say 'not directly.' Were there questions asked

of you in that grand jury with respect to your investigation of the Sims case?

A I don't believe there were any questions asked regarding the Sims case. If there were, I did invoke my constitutional privileges."

Following testimony about the seizure of drugs and money the witness was asked:

"Q In the federal grand jury were you questioned with respect to the seizure of currency?

A I don't believe I was. If I was, I did invoke my constitutional privileges.

Q Now I ask you at this time, Officer Bonino, did you seize any money on May 21, 1971 that was not reported to the Police Property Clerk?

MR. MOSLEY: I object.

THE COURT: Overruled. I will take it.

THE WITNESS: At this time, Your Honor, may I confer with my counsel?.

THE COURT: Yes.

THE WITNESS: Your Honor, after conferring with my attorney, at this time I wish to invoke my constitutional privilege and not answer this question.

THE COURT: Next question.

Q Were there any drugs seized in connection with this investigation that were not turned into the Police Property Clerk?

MR. MOSLEY: I object, Your Honor.

THE COURT: Overruled.

THE WITNESS: May I confer with my counsel?

THE COURT: Yes.

(The witness then conferred in private with Mr. Washor.)

THE WITNESS: Your Honor, after conferring with my attorney, at this time I wish to invoke my consitutional privilege and not answer this question.

THE COURT: Next question.

Q Were there any drugs seized in connection with this investigation that were not turned into the Police Property Clerk?

MR. MOSLEY: I object, your Honor.

THE COURT: Overruled.

THE WITNESS: May I confer with my counsel, your Honor?

THE COURT: Yes.

(The witness then conferred in private with Mr. Washor.)

MR. DILLER: Will the record reflect that the witness had an opportunity and did in fact confer with counsel, your Honor.

THE COURT: Let the record so indicate.

THE WITNESS: Your Honor, after conferring with counsel, I again invoke my constitutional privileges and refuse to answer that question.

Q Officer Bonino, again directing your attention to May 21, 1971, was there jewelry seized from the Sims' home which you did not report to the Police Property Clerk?

THE WITNESS: Again, your Honor, after conferring with my attorney, I invoke my constitutional rights and refuse to answer this question.

Q In connection with monies seized at the Sims' home on May 21, 1971, were you together with a brother officer at that time?

A Yes, I was.

Q And who was the brother officer?

A I believe it was Patrolman Henry, I believe it was.

Q And was he with you present when the money was taken from the house?

22

A Yes.

Q And was Patrolman Fratello present?

A At the Sims' residence?

Q Yes.

A No, he was not.

Q Was Patrolman Fratello with you at the Cameron residence?

A Yes, he was.

Q With respect to the Cameron residence, again on May 21, 1971, was there any money taken from that house that were not reported to the Police Property Clerk?

THE WITNESS: Again, your Honor, after conferring with counsel, I wish to invoke my constitutional privileges and not answer this question."

The witness was further questioned concerning the amount of drugs, cash and other items seized which he answered in detail.

Before discussing the testimony of three additional witnesses produced by the defendants, comment upon defendants' argument is deemed appropriate at this time. The People produced no witnesses.

Guidelines for determination of an attack upon police affidavits in support of application for warrants have been prescribed in People v. Alfinito, supra, cited by the Appellate Division, in remitting the instant case to this Court for hearing.

The thrust of defendants argument is that they have supported the burden, urging the theory that once a police officer availed himself of the privilege of exercising the Fifth

22

Amendment, it became incumbent upon the People to refute the admission of perjury inherent therein. This conclusion implies an inherent admission of perjury with respect to any sworn statements at any time previously made by any person who exercises such constitutional privilege. This Court doubts that the men who wrote that privilege into the constitution intended that any person who availed himself of it thereby automatically conceded an admission of perjury. On the contrary, it would appear that by permitting a person to exercise such privilege, they were recognizing his right to protect himself without committing perjury.

However, careful examination of the questions propounded with respect to which the privilege was exercised is necessary to help determine whether the answers thereto, if given, might significantly aid the Court in determination of the truth or falsity of the affidavit made in support of the warrants. The only such question in which reference was made to the affidavit appears on page 41 of the Minutes as follows:

> "Q Were you questioned in the federal grand jury concerning the truthfulness of the affidavit that you submitted in order to procure a search warrant in this case.
>
> A As far as my recollection goes, I was not questioned on that. And if I was, I would have again invoked my constitutional privileges."

The witness was closely questioned at considerable length concerning the preparation of the affidavit, the reasons for it, the observations of the witness, the facts and circumstances preceding the execution of it, to all of which the

defendant testified freely without once asserting his constitutional rights. From the foregoing, it is obvious that the witness invoked his constitutional rights only when asked about police conduct in connection with the execution of the warrants and not with respect to affidavit preceding it.

Defendants further pointed out that the People saw fit not to call any of Officer Bonino's named partners, one of whom was present during the alleged observations and the other at the time of the arrest, citing People v. Harrington, 70 Misc 2d 303, in which a defendant had accused a named police officer of coercing his confession. In that case the Court granted suppression of the admissions after finding that the defendant had been held in custody without counsel for a week between two interrogations but denied the motion to suppress the use of the gun in evidence, holding further that the owner of the gun was not involved in the allegations of the crime and was available equally to the People and to the defendant, and that in such respect the defendant had failed to meet his burden of proof. As pointed out by the Court with respect to confessions, the burden is on the People to show their admissibility beyond a reasonable doubt (People v. Huntley, 15 N Y 2d 72), whereas in the instant situation the burden is on the defendants. It was the defendants not the People who produced Officer Bonino as a witness. The other officers were known and available

equally to both. A further distinction is that in the instant case there was no uncontradicted evidence to refute. The failure of the People to produce such other witnesses cannot be viewed in the light that their version would controvert any proof previously offered as in the cited case.

Defendants' contention that the witness was evasive and in fact refusing to testify is untenable. An examination of the testimony shows direct answers to all questions relating to observations and activities of the officers and defendants leading up to and including the preparation of the affidavit in the instant case. True, the witness refreshed his recollection from the affidavit but the Court cannot construe that as evasion or reluctance to answer questions. The defendants' counsel is endeavoring to have such testimony tainted by the witness' exercise of his constitutional rights with respect to questions concerning his conduct during or after the execution of the warrants is understandable but this Court cannot agree with the principle thus sought to be established, to wit, that unlawful conduct other than perjury of an individual, whether or not he be a police officer, if proven to have been committed subsequent to the execution of an affidavit, establishes perjury in the affidavit.

As counsel states, it is indeed a bizarre spectacle for a police officer appearing in Court to be exercising his constitutional rights in response to questions concerning his activities while engaged in the performance of his

official duties. Such conduct, both with respect to the proceedings before the Knapp Commission and in this Court, lend support to the specter of police corruption requiring full airing of the facts in an effort to determine whether or not there was perjury in the affidavit admitted in support of the warrants.

Defendants produced three additional witnesses. The first, Henry Schnitzer, an attorney of long standing, who had been a member of the police force and had worked in the Police Commissioner's Confidential Squad, conceded to be an expert in policy cases, testifying in substance that nobody places policy bets after the third race and that no special type envelopes are used in the policy business. (Minutes, pp.74-76.) Counsel's argument and conclusions are that no policy banker would take a bet after 2 P.M., as bearing upon Officer Bonino's testimony that he had observed envelopes being handed to defendant Sims after 2 P.M. on May 19, 1971 (p.66). The Court finds the testimony of this witness and the aforesaid argument not persuasive.

The remaining two witnesses were defendants Edith Cameron and Juanita Sims. Mrs.Cameron testified on direct examination that defendant Stanley Sims was the only person who entered her home between 11:30 A.M. and 2:30 P.M. on May 18, 1971 (Minutes, p. 78), that he remained until the evening (p.79), that from the time he entered until the evening, the rest of the defendants came in (pp.79-80). While still on direct examination she testified as follows:

27

"Q Now, directing your attention to the 19th, the following day, did you hear Patrolman Bonino testify that approximately five or six men came to your home during that period of time?

A Yes.

Q And did anyone come to your home on the 19th?

A Yes, they did.

Q Who came?

A Mr. Williams and Mr. Davis.

Q Did anyone ring the bell during that period of time other than those persons?

A No.

Q Who answers the door in your house?

MR. LEARY: Objection.

A I do.

THE COURT: Overruled. I will take it.

Q And did Oscar Thomas stay at any time in your home on the 19th of May?

A No."

The equivocal response to the second question was not further explored but in any event her testimony, unsupported by more credible evidence, cannot be accepted at face value in the light of her obvious interest in the outcome and her plea of guilty in this very case to criminal possession of gambling records, second degree.

Witness, Juanita Sims, also a defendant who pleaded guilty to the same crime, denied that any people knocked on her door on May 18, 1971 before 2:55 and 3:30 in the afternoon and that anybody came to her house on May 19th (p. 82). She

further testified on direct examination that her husband was "probably" home and that she usually answers the door herself. The Court was unimpressed with her testimony.

There remains now the weighing of the evidence produced by defendants to determine whether or not it was sufficient to cast doubt upon the truth of the affidavit submitted in support of the warrants. Though it is no doubt true that in the normal course of our everyday experience the automatic reaction to the assertions of the constitutional right of refusal to answer is the mental question::"I wonder what he had to hide?"--it does not simultaneously brand the witness as a perjuror or as a person who has committed any crime. Nevertheless, as the Appellate Division pointed out in that portion of its opinion previously quoted: "However tenuous the grounds in support thereof, the specter of police corruption was raised here and justice required a hearing at which the facts could be fully aired."

This Court cannot agree with defendants' basic argument, to the effect that a police officer having asserted his said constitutional rights with respect to conduct involved in the execution of the warrants, all of which were subsequent to the execution of the challenged affidavit thereby impugns the truth of the contents of the affidavit. Even assuming, arguendo, that proof had been adduced of criminal acts of the police officer during or subsequent to the making of the affidavit, the conclusion that the affidavit was perjurious would be without foundation. Carrying the assumption a step

further, the Court cannot assume or conclude that because a police officer asserts his constitutional rights to avoid a forced disclosure of his possible participation in criminal conduct that he was necessarily guilty of perjury in the execution of the said affidavit. The Court's previous comment with respect to the limits of the area in which the police officer witness availed himself of the privilege, and the fact that he testified freely with respect to his conduct prior to and in connection with the execution of the affidavit, are here pertinent.

The Court finds that the proof offered by the defendants falls far short of the standards prescribed in People v. Alfinito, supra, by which even a fair doubt arising from the testimony would have to be resolved in favor of the warrant. The Court holds that no doubt has been cast upon the truth of the contents of the affidavit submitted in support of the warrants. The defendants have failed to sustain the burden of proof. The findings of this Court are as set forth in the foregoing.

Order entered accordingly.

The clerk of the court is directed to mail a copy of this decision and the order entered thereon to the attorney for the defendants.

.....WILLIAM.C..BRENNAN.....
J. S. C.

OPINION OF APPELLATE DIVISION

44 A.D.2d 355

UNREVISED COPY
NOT FOR PUBLICATION

May 6, 1974. 31

SUPREME COURT : APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT.

Attys. for Appels.

GULOTTA, P.J., SHAPIRO, CHRIST, BRENNAN and BENJAMIN, JJ.

THE PEOPLE, etc.,

Respondent,

v.

EDITH MAY CAMERON, STANLEY TAYLOR SIMS, KENNETH DAVIS, ROBERT STEWART WILLIAMS, MARVIN CAMERON, JENNIE SIMS,

Appellants.

Appeals from six judgments of the Supreme Court, at Criminal Term in Queens County, all rendered May 15, 1972 (one as to each defendant), convicting them of criminal possession of a dangerous drug (in varying degrees) and other crimes, upon guilty pleas, and imposing sentences (WILLIAM C. BRENNAN, J.). The appeal brings up for review three orders of the same court, two of which denied their two successive motions to suppress evidence, prior to the guilty pleas (dated November 30, 1971 [FRANK D. O'CONNOR, J.] and January 26, 1972 [WILLIAM C. BRENNAN, J.]), and the third again denied said motions, after rendition of the judgments and after a hearing held pursuant to a remand during the pendency of the appeals (dated August 14, 1973 [WILLIAM C. BRENNAN, J.]).

Diller & Schmuklor (Joel A. Brenner of counsel), for appellants.

Nicholas Ferraro, District Attorney of Queens County (Charles M. Newell of counsel), for respondent.

S H A P I R O, J. The question here is whether evidence seized pursuant to a search warrant should be suppressed because the police officer upon whose affidavit the warrant issued refused, on constitutional grounds, to answer questions at the suppression hearing with regard to his conduct following the seizure (including what he had done with the seized items). The appeals are from six respective judgments convicting the six defendants of various crimes, upon guilty pleas, and the appeals bring up for review three orders denying motions by the defendants to suppress evidence. One of the orders was made after a hearing held pursuant to a remand during the pendency of the appeals, as appears below.

When these appeals were originally before us we held that the statements contained in the police officer's affidavit made a sufficient showing of probable cause to support the issuance of the warrant, but we remanded the case to the Criminal Term solely to determine, after a hearing, whether those statements were perjurious (People v. Cameron, 40 A D 2d 1034). The remand was predicated on the allegations of the defense that the affidavit contained perjurious statements and that the officer had refused to testify before a Federal Grand Jury inquiring into his official conduct on the ground that his testimony might incriminate him. Noting that a search warrant

may be set aside if the affidavit upon which it was issued is shown to be perjurious, we held the appeals from the judgments of conviction in abeyance pending the hearing ordered to determine that issue. That hearing has now been had and Mr. Justice BRENNAN has determined that the defendants did not sustain the burden which the law places upon them of demonstrating the perjurious nature of the affidavit.

The issue presented is a troublesome one, since the police officer whose veracity is at issue did refuse, on constitutional grounds, to answer questions before Mr. Justice BRENNAN with regard to the execution of the warrant or his disposition of the items seized.

No one can hold a brief for a police officer who, in a judicial inquiry, refuses to answer questions about the performance of his duties on the ground that his answers might be incriminating. However, as Mr. Justice BRENNAN pointed out, all of the police officer's refusals to answer dealt with occurrences which took place after the seizure under the warrant; none of them dealt with the truthfulness of the affidavit upon which the warrant was obtained. The record is crystal clear that he was examined in great detail about the contents of his affidavit and answered every question asked him with respect to that.

The police officer at the hearing before Mr. Justice BRENNAN denied he had been questioned before the Federal Grand Jury about the truthfulness of his affidavit in this case, but he then volunteered the information that if he had been so questioned he would have invoked his constitutional privileges.

Mr. Justice BRENNAN thereupon, in effect, suggested that the officer be directly asked whether his affidavit was truthful. That suggestion was not accepted. If that had been done and if the officer had then invoked his constitutional privilege against incrimination, we would be presented with a different picture. Here, however, we have a situation in which the ultimate burden of proof to establish perjury was upon the moving defendants (People v. Alfinito, 16 N Y 2d 181, 186) and I cannot quarrel with the court's findings that they failed to sustain that burden, particularly as another police officer was present at the time the observations underlying the affidavit were made and was not called as a witness, despite the court's pointed suggestion that this be done.

Accordingly, the judgments of conviction and the three orders should be affirmed.

GULOTTA, P.J., CHRIST, BRENNAN and BENJAMIN, JJ., concur.

CERTIFICATE DENYING LEAVE TO APPEAL TO NEW YORK COURT OF APPEALS

(Wachtler, J., dated 5/29/74)

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. SOL WACHTLER
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

-against-

EDITH MAY CAMERON

CERTIFICATE
DENYING
LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein*, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
May 29, 1974

/s/ SOL WACHTLER
Associate Judge

*Description of Order: Judgment of Supreme Court, Queens County, dated May 15, 1972, affirmed by Appellate Division, Second Department, May 6, 1974.

PETITION FOR WRITS OF HABEAS CORPUS

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. EDITH MAY CAMERON, STANLEY TAYLOR SIMS, KENNETH DAVIS, ROBERT STEWART WILLIAMS, MARVIN CAMERON, and JENNIE SIMS, Petitioners-Relator	
-against-	NO:
CHARLES FASTOFF, Director of NYC Department of Probation; WALTER DUMBAR, NY State Director of Probation; JOHN KLEIN, Chief Probation Officer, Queens County; THOMAS AGRESTA, Presiding Justice, Supreme Court, Criminal Term, Queens County; LEON J. VINCENT, Warden, Green Haven Correctional Facility, Stormville, NY; J. EDWIN LAVALLEE, Warden, Clinton Correctional Facility, Dannemora, NY; JAMES THOMAS, Warden, Rikers Island, NY; and HAROLD J. SMITH, Warden, Attica Correctional Facility, Attica, NY, Respondents	PETITION FOR WRITS OF HABEAS CORPUS BY PERSONS IN STATE CUSTODY

To: The Honorable Presiding Judge of the United States District Court for the Eastern District of New York

The petition of the above named petitioners shows that:

1. This petition is made on behalf of Edith May Cameron who is detained by the State of New York in the custody of the Supreme Court of the State of New York, Queens County, and the State Probation Department [C.P.L. §§410.50] on a sentence of probation and a $1,000.00 fine, and on behalf of Stanley Taylor Sims who is detained by the State of New York at Green Haven Correctional Facility, Stormville, New York, and on behalf of Kenneth Davis who is detained by the State of New York at Clinton Correctional Facility, Dannemora, New York, and on behalf of Robert Stewart Williams who is detained by the State of New York at NYC

Correctional Institution for Men, Rikers Island, New York, and on behalf of Marvin Cameron who is detained by the State of New York at Attica Correctional Facility, Attica, New York and on behalf of Jennie Sims who is detained by the State of New York in the custody of the Supreme Court of the State of New York, Queens County, and the State Department of Probation [C.P.L. §§410.50] on a sentence of probation and a fine of $1,000.00.

2. The cause of petitioners' detentions are judgment of the Supreme Court of the State of New York, Queens County, rendered on May 15, 1972, convicting petitioners Robert Williams and Marvin Cameron on their pleas of guilty to criminal possession of a dangerous drug in the second degree and sentencing them to 15 years imprisonment, convicting petitioners Stanley Sims and Kenneth Davis on their pleas of guilty to criminal possession of a dangerous drug in the third degree and sentencing them to 15 years and 12 years imprisonment, respectively, and convicting petitioners Jennie Sims and Edith May Cameron on their pleas of guilty to criminal possession of a dangerous drug in the sixth degree and sentencing them to a fine of $1,000.00 and a period of probation not to exceed three years. This petition is made on behalf of each petitioner individually and severally pursuant to Federal Rules of Civil Procedure 20 (a) and 81 (a)(2).

3. These writs are sought because of illegal detentions pursuant to the above judgments of conviction rendered in violation of petitioners' 14th, 5th, 4th, and 6th Amendment rights to a fair hearing and due process of law, freedom from arbitrary and unreasonable police search and seizure, effective assistance of

counsel, compulsory process, and confrontation of witnesses, because the State of New York, acting through its law enforcement officer-agent, improperly invoked, and indicated it would invoke, the 5th Amendment privilege against self-incrimination, and thereby declined to respond to questions about theft of seized evidence from petitioners' homes and about the truthfulness of a search warrant affidavit, questions relevant to the issues on the hearing, to the integrity of the criminal justice process in the case, and to the bias, motives and veracity of the officer in the performance of his police duties both as a witness at the hearing and his conduct of the seizure and the application for the search warrant.

The detentions further violate petitioners' 4th Amendment rights, because the facts presented by the officer in his affidavit contained insufficient probable cause upon which a search warrant could issue.

The Factual Basis for the Issues Presented

(The Legal Foundation is Presented in Petitioners' Memorandum of Law filed with this Petition)

Petitioners Edith Cameron, Stanley Sims, Kenneth Davis, Robert Williams and Marvin Cameron were indicted in the Supreme Court of the State of New York, Queens County, for the crimes of criminal possession of a dangerous drug in the first degree, promoting gambling in the first degree, and possession of gambling records in the first degree. Petitioners Edith and Marvin Cameron were additionally charged with possession of weapons and dangerous instruments as a misdemeanor. Petitioner Jennie Sims was indicted separately for the crimes of promoting gambling in the first degree

and possession of weapons and dangerous instruments as a misdemeanor.

Prior to the introduction of their guilty pleas (Williams and M. Cameron, 2d degree drug possession; S. Sims and Davis, 3rd degree drug possession; J. Sims and E. Cameron 6th degree drug possession), petitioners moved to controvert the search warrant and have the evidence suppressed because of police perjury and fraudulent conduct and the absence of probable cause for the issuance of the warrant. The motions were denied in the trial court; petitioners pleaded guilty, and, in its first order, the Appellate Division affirmed the trial court's finding of probable cause; but, given defense counsel's averment that Knapp Commission testimony resulted in a Federal Grand Jury investigation of the arresting officers in this case wherein these officers had pleaded the 5th Amendment, the court ordered a hearing on the allegation of police perjury and misconduct. (People v. Cameron, et. al, 40 A.D.2d 1035, 2d Dept., 1972; See Appendix). After a hearing conducted pursuant to the Appellate Division remand, the Supreme Court denied petitioners' motion to controvert the warrant on grounds of perjured police testimony and misconduct (See Opinion appended, hereto), and the Appellate Division affirmed, with opinion (People v. Cameron, 44 A.D.2d 255, 2d Dept., 1974; See Appendix). The Court of Appeals declined to hear the case. (Certificate denying leave is appended hereto). The Supreme Court of the United States denied application for a writ of certiorari on December 9, 1974.

The following is a summary of the hearing testimony that

forms along with the search warrant and affidavit, (appended hereto) the factual basis for issues to be argues:

Patrolman Lucido Bonino testified that he was an expert on policy (4-5).*

On May 18, 1971, he and a brother officer were investigating petitioner Stanley Sims. He did not recall on how many occasions prior to May 18, he had seen Sims, nor the approximate dates. He did not produce any prior reports made on Sims. He was unable to produce his memo book for May 18, the only day's observations detailed in the search warrant affidavit (6-9, 46-48, 12). Only after reading the search warrant was the Patrolman's recollection refreshed and was he able to testify to the circumstances related therein. He arrived in the vicinity of the Sims' residence at about 11:00 A.M., but he could not remember where his car was parked (9-12). Sims left his residence, entered a car, and drove to the petitioners' Cameron residence.

The court interrupted during this line of examination, and, although there had been no prior suppression hearing, the court ruled, "You are not going to go through the whole hearing_____ ... We are not going to go through the whole observation until you have something to indicate that perjury was made here" (13-18). Counsel objected to the interruption and argued,

> there is testimony to be adduced at this trial to indicate that the statements of the officer, of his observations were indeed not truthful and indeed never occurred, and, therefore, a perjured affidavit was submitted application [sic] for a search warrant. This is in conjunction with other questions of the credibility of the officer(16

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* Numerical reference are to the minutes of the suppression hearing

At this point defense counsel was directed to lay a foundation connecting testimony as to these events with his allegations that a Knapp Commission witness had said the officer had committed perjury with regard to this case. The Patrolman admitted being subpoenaed before a State, Queens County, Grand Jury in regard to this case, but he then took the Fifth Amendment when asked if he had been similarly subpoenaed by a Federal Grand Jury. After recess the hearing was adjourned to permit the officer to appear with counsel, pursuant to application of the District Attorney (15-22).

The officer subsequently appeared with counsel (27), and he was cautioned to confer only with his counsel, not to look for comment from the two new Assistant District Attorneys who were brought into the case after the recess. Defense counsel, arguing "who are my adversaries in this case?" stated to the judge he had seen the witness looking to the prosecutor for comment before answering questions (30).

Honoring the new District Attorney's belated objection to the last question put before the recess, the Court struck the Patrolman's 5th Amendment answer and counsel asked again if he had testified before a Federal Grand Jury.

He said he was subpoenaed by a Federal Grand Jury but "I don't believe there were any questions asked regarding the Sims case. If there were, I did invoke my constitutional privileges" (31).

Over objections by the District Attorney that these questions were immaterial, the officer testified that when Sims was arrested a large amount of drugs and currency was seized at his

residence (32-33). Although the court continued to permit the questions over DA objection, the Patrolman then invoked the Fifth Amendment and refused to answer questions as to whether any seized drugs, currency or jewelry was not turned over to the Police Property Clerk (34-37). He refused to answer similar questions with regard to unreported seizures of drugs, currency or jewelry from the Cameron residence (38, 40-41).* Furthermore, he refused to answer whether he had seized and kept any drugs not noted on the inventory made on the return of the warrant (39-40).

When asked if he had been questioned on the same subjects in the Federal Grand Jury and, if he had been questioned there about the truthfulness of the affidavit he submitted for a search warrant, he replied, "As far as my recollection goes, I was not questioned on that. And if I was, I would have again invoked my constitutional privileges" (41).

He said he had made notes of the observations on May 18, 1971** that he later put in the affidavit but he did not believe he put these in his memo book and he probably threw them away (44-45). His memo book for May 19, 1971 said only "1115 hours to approximately 1545 hours, vicinity of Linden and 197th and Farmers and New York regarding search warrant observation;" none of his specific obser-

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* He denied that the real reason he got a search warrant for the Sims and Cameron homes was to steal money he believed was present there (43).

** His affidavit for the warrant recited observations on May 18, 19 and 20, 1971. Only for May 18 (the date for which no memo was available) were Sims' actions detailed in the affidavit; for the 19th and 20th it was merely said that the May 18 actions were repeated "to the letter."

vations were in the memo book and he did not know if Police Department regulations required that such observations be written down (49-50).

Although he could not remember numerous details, the officer was able, after looking at his affidavit, to testify that on May 18, 19, and 20 he saw petitioner Sims receive what he believed were policy bets at the front door of his and the Camerons' house (55-67).

Toward the end of counsel's examination of the witness the Court interrupted the examination:

> What do you want him to do, contradict the statements he made in the affidavit and everytime you ask him a question he looks at the affidavit to answer you?" (69)

Henry Schnitzer testified that he was an expert on "policy" (72). He testified that in playing policy no one takes policy bets after the time that the third race is finished because after that race is finished the first number of the day's policy number can be ascertained (74-76). Therefore, no policy banker would take a bet after 2:00 P.M. (76)(and officer Bonino said he saw Sims allegedly taking policy slips after 3:00 P.M. [65]).

Edith Cameron testified that contrary to officer Bonino's testimony no one other than Stanley Sims entered her home between 11:30 A.M. and 2:30 P.M. on May 18, 1971; Sims stayed through the evening when the rest of the petitioners also arrived (79-80).

Juanita (Jennie) Sims also testified that, contrary to officer Bonino's testimony, no one came to her home on May 18, 1971 between 2:55 and 3:30 P.M. (82).

Both sides then rested, the District Attorney having declined to present any evidence (84).

On the basis of the above testimony, and the lack of it under the Fifth Amendment, the trial court ruled that petitioners had not sustained their burden of proving perjury. The Appellate Division affirmed this ruling. While recognizing that,

> The remand was predicated on the allegations of the defense that the affidavit contained perjurous statements and that the officer had refused to testify before a Federal Grand Jury inquiring into his official conduct on the ground that his testimony might incriminate him, (emphasis supplied),

the Appellate Division seemed to rest its decision on the ground that the police theft of seized contraband in this case was irrelevant to the judicial inquiry. Despite the officer's own testimony that he would take the Fifth Amendment if asked whether his affidavit were truthful, the Appellate Division stated, "all of the police officer's refusals to answer dealt with occurrences which took place after the seizure under the warrant." (See Appendix for full text of the opinion).

As to the question of probable cause for the issuance of the warrant based on the face of the officer's affidavit, (See copy attached hereto), the Appellate Division simply affirmed the trial court's finding of probable cause.

Following the trial court's denial of their joint motion to suppress, petitioners pleaded guilty, as above described, with the understanding, according to New York Criminal Procedure Law §§710.70 that their constitutional rights with respect to the search and seizure and the conduct of the suppression hearing would

be preserved: "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty." See United States ex rel. Newsome v. Malcolm, 492 F2d 1166 (2d Cir., 1974) cert. gtd. 94 S.Ct. 3170 argued Dec. 11, 1974.

4. Petitioners have exhausted all available State remedies.

As has been noted above, the issues surrounding the search and seizure itself and the conduct of the hearing to determine the facts surrounding the search and seizure were presented twice to the Appellate Division of the State of New York, Second Department, and the denial of the motion to suppress was there ultimately affirmed. People v. Cameron, et. al, 40 A.D.2d 1035 (2d Dept., 1972); People v. Cameron, 44 A.D.2d 355 (2d Dept., 1974). The Court of Appeals of the State of New York, and the Supreme Court of the United States both declined to review the case. The opinions of the Courts of New York State and petitioners brief in those Courts, show clearly that the issues were substantially and fully presented and decided by those Courts

> As counsel states, it is indeed a bizarre spectacle for a police officer appearing in Court to be exercising his constitutional rights in response to questions concerning activities while engaged in the performance of his official duties. Such conduct, both with respect to the proceedings before the Knapp Commission and this Court, lend support to the specter of police corruption requiring full airing of the facts in an effort to determine whether or not there was perjury in the affidavit admitted in support of the warrants ... [However] even assuming, arguendo, that proof had been adduced of criminal acts of the police officer during or subsequent to the making of the affi-

davit, the conclusion that the affidavit was perjurous would be without foundation.

(Opinion of the Supreme Court of the State of New York [Brennan, J.] dated August 14, 1973. (See Appendix, hereto)).

Officer Bonino's taking the Fifth ... requires that the People come forward with some evidence ... the lower court rejected this contention on the erroneous ground that it 'implies an inherent admission of perjury with respect to any sworn statements at any time previously made by any person who exercises such constitutional privilege.' (Emphasis added) Appellants would contend that equating the exercising of privilege with an assumption of perjury has a great deal of factual validity in the circumstances of this case. Furthermore, the legal validity of the equation also has great merit. Policemen are quasi-public persons who, while they have an absolute right to the Fifth Amendment when defendants on a criminal case, have no such absolute right in other situations. Since they may be disciplined or even fired for taking the Fifth Amendment (Gardner v. Broderick, infra) and since, when not defendants, their taking of the Fifth may be adversely commented upon ... it is wholly proper to contend that when a policeman accused of perjury takes the Fifth Amendment this raises some implication of that perjury.

(Petitioners brief in the Appellate Division at pp 13 & 14)

The Court of Appeals has emphasized the importance of a police officer's notes as a defense tool and their absence here is particularly significant they are the only objective evidence of what really happened on May 18th. When a witness has taken the Fifth Amendment and the burden is on the caller to establish perjury, 'a right sense of justice' [particualrly] entitled the defense to ascertain what the witness said about the subject under discussion on an earlier occasion. The failure of the prosecutor to produce these papers must weigh heavily against the People ... taking the Fifth Amendment 'deprived the defense of the opportunity of showing that there was perjury in the affidavit' and since the deprivation came about via the actions of a law-enforcement officer it must redound to the prejudice of the People. In other words, to the extent that officer Bonino's actions are considered as preventing appellants from supporting their burden of proof, the fault for that must

> be with the People ... It must be noted that if the People, who asked Bonino not a single question, wanted to get at the truth they could have demanded Bonino sign a waiver of immunity at pain of losing his position. New York City Charter Section 1123 and New York State Constitution Article I, Section 6. See Gardner v. Broderick 393 U.S. 273, 275-276 (1968). Instead, they opposed revealing the truth by repeatedly objecting to defense counsel's questions of Bonino, even after Bonino secured an attorney, and by introducing no evidence of their own.
>
> (Petitioners' brief in the Appellate Division at pp 15-16)

> No one can hold a brief for a police officer who, in judicial inquiry, refuses to answer questions about the performance of his duties on the ground that his answers might be incriminating. However, as Mr. Justice BRENNAN poin-ed out, all of the police officer's refusals to answer dealt with occurrences which took place after the seizure under the warrant; none of them dealt with the truthfulness of the affidavit upon which the warrant was obtained. The record is crystal clear that he was examined in great detail about the contents of his affidavit and answered every question asked him with respect to that.
>
> (Opinion of the Appellate Division, Second Dept., People v. Cameron, 44 A.D.2d 355 1974)

> Petitioners' contemporaneous memorandum of law discusses the legal conslusions and supporting authorities on the exhaustion of State remedies.

No previous applications for federal or state habeas corpus, or other post-conviction relief, have been made.

WHEREFORE, petitioners respectfully pray that writs of habeas corpus issue directing respondents to produce the bodies of petitioners before this Court at a time and place to be specified, to the end that petitioners' convictions be declared null and void as having been based on evidence unconstitutionally obtained, and rendered in contravention of the rights to due process of law, fair hearing, effective assistance of counsel, compulsory porcess and confrontation of witnesses, or, in the alternative, to the end that

the full and fair hearing on the seizure of the evidence in the case be helf by this Court which hearing the State of New York failed to and will not provide (See Petitioners Memorandum of Law), and for such other and further relief as this Court may deem just and proper.

HOWARD J. DILLER
Attorney for Petitioners
299 Broadway
New York, New York
LAWRENCE STERN
of counsel

STATE OF NEW YORK
COUNTY OF NEW YORK SS:

HOWARD J. DILLER, being duly sworn, deposes and says that he is the attorney retained by Petitioners to represent them in their application to the United States District Court for the Eastern District of New York for writs of habeas corpus, and that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

HOWARD J. DILLER

Subscribed and Sworn to before me

this day of January, 1975

MEMORANDUM AND ORDER DENYING PETITIONS FOR WRITS OF HABEAS CORPUS

(Bruchhausen, J., dated 3/20/75)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

52

- x

UNITED STATES OF AMERICA ex rel. EDITH MAY CAMERON, et al.,

Petitioners,

-against-

CHARLES FASTOFF, et al.,

Respondents.

No. 75 C 167

March 20, 1975

- x

MEMORANDUM and ORDER

BRUCHHAUSEN, D. J.

The petitioners have applied for a writ of habeas corpus.

On February 17, 1972, the petitioners, Robert Williams and Marvin Cameron pleaded guilty in the Supreme Court, Queens County to an indictment, charging them with criminal possession of a dangerous drug, in the second degree. The petitioners, Stanley Taylor Sims and Kenneth Davis, pleaded guilty to possession of a dangerous drug, in the third degree. The petitioners, Jennie Sims and Edith Cameron, pleaded guilty to criminal possession of a dangerous drug, in the sixth degree.

52

On May 15, 1972 each of the petitioners were sentenced to terms of imprisonment.

A PLEA OF GUILTY CONSTITUTES A WAIVER OF ALL NON-JURISDICTIONAL DEFENSES AND DEFECTS

In United States ex rel. Martin v. Fay, 352 F.2d 418, Cir. 2, cert. denied 384 U.S. 957, the Court stated:

> "As we have recently held in United States ex rel. Glenn, 'A voluntary guilty plea entered on advice of counsel is a waiver of all non-jurisdictional defects in any prior stage of the proceedings' against the defendant. United States ex rel. Glenn v. McMann, 249 F.2d 1018, 2d Cir., August 26, 1965. See also United States ex rel. Swanson v. Reincke, 344 F.2d 260 (2 Cir. 1965); United States ex rel. Boucher v. Reincke, 341 F.2d 977 (2 Cir. 1965."

In United States ex rel. Boucher v, Reincke, supra, the Court stated:

> "By pleading guilty he (the defendant) admitted all the facts alleged in the information and waived all non-jurisdictional defects and defenses."

54

In United States v. Spada, 331 F.2d 995, Cir. 2, cert. denied in 379 U.S. 865, the Court stated:

> "A plea of guilty to an indictment is an admission of guilt and a waiver of all non-jurisdictional defects."

Upon due deliberation, it is ordered that the petition be and they are hereby dismissed.

Copies hereof will be forwarded to the attorneys for the parties.

Walter Bruchhausen
Senior U. S. D. J.

COUNSEL'S LETTER TO JUDGE BRUCHHAUSEN

Dated 3/21/75

DILLER & SCHMUKLER
ATTORNEYS AT LAW
299 BROADWAY
NEW YORK, N. Y. 10007
(212) 349-5554

HOWARD J. DILLER
MARTIN L. SCHMUKLER

5C

March 21, 1975

Honorable Walter Bruchhausen
United States District Judge
United States Court House
225 Cadman Plaza East
Brooklyn, NY 11201

Re: U.S.A. ex rel. Cameron et al.
v. Fastoff et al. 75 Civ 167

Dear Judge Bruchhausen:

I have today received a copy of Your Honor's order of March 20, 1975, dismissing petitioners' application for a writ of habeas corpus. I have attempted to reach Your Honor's chambers by telephone, but have received no answer.

We submit to Your Honor that the recent decision of the United States Supreme Court, Lefkowitz v. Newsome, 95 S. Ct. 886 (February 19, 1975) disposes of the point of law upon which Your Honor rested the order of March 20, and holds directly contrary to that order, to the effect that

> when state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding.
>
> 95 S. Ct. 891-892

We referred to this case in our petition; the case was sub judice at the time of filing. During oral argument before Your Honor on March 14, 1975, I referred to the decision as precluding any question of petitioners' right to apply for federal habeas corpus relief. The Attorney General, of course, did not oppose our application on this issue,

For these reasons, we respectfully request that Your Honor reconsider the decision, reach the merits, and of course, grant the petition.

Re: U.S.A. ex rel. Cameron et al. v. Fastoff et al.

March 21, 1975

Respectfully,

LAWRENCE STERN
Of Counsel
HOWARD J. DILLER
Attorney for Petitioners

LS:crk

cc ATTORNEY GENERAL OF THE
STATE OF NEW YORK
Two World Trade Center
New York, New York
Attention: LILLIAN COHEN
ASSISTANT ATTORNEY GENERAL

SUPPLEMENTAL MEMORANDUM AND ORDER DENYING PETITIONS FOR WRITS OF HABEAS CORPUS

(Bruchhausen, J., dated 3/31/75)

United States District Court
Eastern District of New York

United States of America, ex rel
Edith May Cameron et al.

Petitioners: Relators

vs

No. 75C 167

March 31, 1975

Charles Fastoff et al.

Respondents.

Memorandum and order, Supplemental to the memorandum and order, dated March 20, 1975.

Bruchhausen, D.J.

The petitioners apply for a writ of Habeas Corpus.

On February 17, 1972 they pleaded guilty in the Supreme Court, Queens County to charges in an indictment, viz:

(a) The petitioners, Robert Williams and Marvin Cameron, pleaded guilty to the charge of criminal possession of a dangerous drug, in the Second Degree;

(b) The petitioners, Stanley Taylor Sims and Kenneth Davis, pleaded guilty to the charge of possession of a dangerous drug, in the third degree.

(c) The petitioners, Jennie Sims and Edith Cameron, pleaded guilty to the charge of criminal possession of a dangerous drug, in the 5th degree.

On May 12, 1972, they were sentenced.

In their present petition, they claim violation of four Amendments to the Constitution, including denial of a fair hearing in the State Court, due process, insufficient cause for a search warrant, compulsory process and confrontation of witnesses.

Prior to the present petition, they applied for relief in the State Courts. Opinions of the Appellate Division Second Department are reported in 40 A.D.2nd 1034, 339 N.Y.S.2d 12 and in 44 A.D.2nd 355, 355 N.Y.S.2d 19.

Their said applications were denied by the Appellate Division. The New York Court of Appeals declined to hear the case and on December 9, 1974, the United States Supreme Court denied certiorari.

In their supplemental brief to the Appellate Division, they confected their claims by stating, viz:

"Questions presented."

"1. Whether the appellants (the above named petitioners) sustained their burden of proof by a preponderance of the evidence that officer Bonilla committed perjury."

"2. Whether the affidavit of officer Bonilla set forth probable cause (for the search warrant.)"

This Court submits that the opinions of the said Appellate Division, 44 A.D.2nd 355 and 355 N.Y.S.2nd 19, completely refutes their claims of lack of due process and fair hearings.

On the said opinion, the court, in part, stated

"When these appeals were originally before us we held that the statements contained in the police officer's affidavit made a sufficient showing of probable cause to support the issuance of the warrant; but we remanded the case to the criminal term solely to determine after a hearing whether those statements were perjuries. (People re Cameron, 40 A.D.2nd 1034, 339 N.Y.S.2nd 12. The remand was predicated on the allegations of the defense that the affidavit contained deliberate statements

and that the police officer had refused to testify before a Federal Grand Jury inquiring into his official conduct on the ground that his conduct might incriminate him. Noting that a search warrant may be set aside if the affidavit upon which it was issued is shown to be fraudulent, we held the appeals from the judgments of conviction in abeyance pending the hearing ordered to determine that issue. That hearing has now been held and Mr. Justice Brennan has determined that the defendants did not sustain the burden which the law placed upon them of demonstrating the fraudulent nature of the affidavit. The issue presented is a troublesome one, since the police officer whose veracity is at issue did refuse, on constitutional grounds, to answer questions before Mr. Justice Brennan with regard to the execution of the warrant or the disposition of the items seized. "No one can hold a brief for a police officer who, in a judicial inquiry, refuses to answer questions about the performance of his duties on the ground that his answers might incriminate him. However, as Mr. Justice Brennan points out, all of the police officers' refusal to answer dealt with occurrences after the seizure under the warrant; which took place after the truthfulness of the affidavit upon which the warrant was obtained. The record is crystal clear that he was examined in great detail about the contents of the affidavit and answered every question asked him upon request to that effect. The police officer at the hearing before Mr. Justice Brennan denied he had been questioned before the Federal Grand Jury about the truthfulness of his affidavit in the case, but he then volunteered that information that if he had been questioned he would have invoked his constitutional privilege. Mr. Justice Brennan therefore, in effect, suggested that the officer be directly asked whether his affidavit was truthful. That suggestion was not accepted. If that had been done and if the officer had then invoked his constitutional privilege against incrimination, we would be presented with a different picture. Here, however, we have a situation in which the ultimate burden of proof to establish perjury was upon the moving defendants. (People ex rel. Vitale, 16 N.Y. 2d 181, 186, 264 N.Y.S. 2d 245, 246.) I do not quarrel with the Court's findings that the defendants failed to sustain that burden, particularly as another police officer was present at the time the observations underlying the affidavit were made and was not called as a witness. Despite the Court's pointing suggestion that this be done.

"Accordingly, the judgments of conviction and the three orders should be affirmed.

Six judgments of the Supreme Court, Queens

County, all rendered May 15, 1972 (one as to each defendant), and three orders of the same court, dated November 30th, 1971, February 26, 1972 and August 14, 1973, respectively, affirmed."

Upon due deliberation, it is ordered that the petition be, and it is hereby dismissed.

Copies hereof will be forwarded to the attorneys for the parties.

Walter Bruchhausen
Senior U.S.D.J.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA ex rel. :
EDITH MAY CAMERON, et al., :
Petitioners, : NOTICE OF APPEAL
-against- : 75 Civ, 167
CHARLES FASTOFF, et al., :
Respondents. :

- X

S I R S :

PLEASE TAKE NOTICE that the above-named petitioners hereby appeal to the United States Court of Appeals for the Second Circuit from two orders of this Court (Bruckhausen, J.) dated March 20, 1975 and March 31, 1975 which denied petitioners' application for writs of habeas corpus.

Yours, etc.,

DILLER & SCHMUKLER, ESQS.
HOWARD J. DILLER
Attorney for Petitioners
299 Broadway
New York, New York 10007
(212) 349 5554

TO: CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
225 Cadman Plaza East
Brooklyn, N.Y. 11201

HON. LOUIS J. LEFKOWITZ
ATTORNEY GENERAL, STATE OF NEW YORK
2 World Trade Center
New York, N.Y. 10038

ORDER DENYING MOTION FOR CERTIFICATE OF PROBABLE CAUSE

(Bruchhausen, J., 4/15/75)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel
EDITH MAY CAMERON et al.,

Petitioners-Relators

-against-

CHARLES FASTOFF et al.,

Respondents.

NOTICE OF MOTION FOR A CERTIFICATE PROBABLE CAUSE

75 Civ.167
(Bruchhausen, J.)

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of HOWARD J. DILLER, Esq., attorney for petitioners in the above captioned case, petitioners move this Court at a term thereof on the 17th day of April, 1975, or as soon thereafter as counsel can be heard, for an order granting petitioners a certificate of probable cause to appeal to the United States Court of Appeals for the Second Circuit from the orders of this Court dated March 20 and March 21, 1975, denying petitioners' application for writs of habeas corpus.

Dated: New York, New York
April 7, 1975

Yours, etc

HOWARD J. DILLER
Attorney for Petitioners
299 Broadway
New York, New York
(212) 349-5554

TO: CLERK OF THE COURT

ORDER GRANTING CERTIFICATE OF PROBABLE CAUSE

(Court of Appeals, 2d Circuit, 5/9/75)

75-8110

B 49

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 9th day of May, one thousand nine hundred and seventy five.

United States ex rel.
Edith May Cameron, et al.,

Petitioners-Appellants,

v.

Charles Fastoff, et al.,

Respondents-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellants by notice of motion dated April 24, 1975 for a certificate of probable cause be and it hereby is granted.

/s/
Wilfred Feinberg

/s/
William H. Timbers

/s/
Ellsworth A. Van Graafeiland